Supreme Court, U.S.
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In The

Supreme Court of the United States

WALKER INTERNATIONAL HOLDINGS LIMITED,

Petitioner,

v.

THE REPUBLIC OF CONGO, CAISSE CONGOLAISE D'AMORTISSEMENT, and MURPHY EXPLORATION & PRODUCTION COMPANY – INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's decision that it lacked jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610, to compel the Republic of Congo to pay an undisputed commercial debt owed by it to Walker International Holdings Limited even though the Republic of Congo waived any immunity it may have had in connection with any proceeding for enforcement of the debt. This case challenges whether a third party garnishee has standing to assert a claim of sovereign immunity for a foreign state when the foreign state itself has not asserted any immunity. In holding that the right to raise immunity under the FSIA does not belong exclusively to the foreign state, the Fifth Circuit's decision conflicts with the holdings of the Second, Ninth and Eleventh Circuits.

Two questions are presented:

1. Does a third-party garnishee have representational standing to raise putative defenses under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, where the sovereign itself has declined to do so, has waived its right to do so, and the court has jurisdiction under 28 U.S.C. § 1330?

2. Except as provided in 28 U.S.C. § 1611, can a foreign state waive its immunity with respect to execution against its property regardless of the property's nature or use and must a court give effect to such waiver?

PARTIES TO THE PROCEEDING

In the proceedings below, Walker International Holdings Limited ("Walker") was the plaintiff-appellant. The Republic of Congo and Caisse Congolaise D'Amortissement, a department within the government of The Republic of Congo (jointly referred to as "The Republic of Congo"), were each named as a defendant-appellee and were each properly served, but neither participated in the court litigation. Murphy Exploration and Production Company-International was a garnishee-appellee.

RULE 29.6 STATEMENT

Walker is a subsidiary of Select Capital Limited, which is privately owned. There is no publicly held company that owns 10% or more of Walker's stock.

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PETITION FOR A WRIT OF CERTIORARI

Walker International Holdings Limited respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at ___ F.3d ___, and is reprinted in the Appendix to the Petition ("App.") at 1a-15a. The district court's opinion, which is not reported, is reprinted at App. 16a-29a.

JURISDICTION

The Court of Appeals entered its judgment on December 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. The pertinent provisions are reproduced at App. 30a-48a.

STATEMENT OF THE CASE

A. Factual Background

This case concerns the enforcement of certain commercial debts incurred, but later defaulted upon, by The Republic of Congo ("Congo"). In 1988, the Congo and

Sadelmi Cogepi SpA, an Italian company, entered into a contract for the construction of electrical infrastructure in the Congo. Sadelmi completed the construction and extended credit to the Congo during construction, but the Congo defaulted on its payments. The Congo and Sadelmi then entered into a debt restructuring agreement in which the Congo expressly agreed to resolve any disputes by arbitration in the International Chamber of Commerce ("ICC").

In 1997, Sadelmi assigned its rights and interest in the debt to Walker. In 1998, after the Congo again defaulted on payment, Walker brought the dispute to the ICC. Following a hearing in which the Congo actively participated, the ICC found that the Congo was liable to Walker and issued an award for $26,093,251.00, plus interest. In July 2000, the ICC's appellate body confirmed that award. Under the rules that govern ICC proceedings, Congo was obligated, and did agree, "to carry out any Award without delay" and to "waive[] their right to any form of recourse insofar as such waiver can validly be made." Article 28(6), ICC Rules of Arbitration.

Although the Congo has never challenged the award, it did not make the required payments. Walker therefore pursued other avenues for repayment, including filing suit in the United States District Court for the District of Columbia against the Congo to enforce the ICC Award. On March 15, 2002, the District Court entered a default judgment against the Congo. After Murphy Exploration and Production Company-International ("Murphy"), a Texas company, announced in the press on May 13 and 14, 2003, and to its stockholders that it had signed two oil production sharing contracts with the Congo for oil exploration projects, Walker registered its default judgment

against the Congo in the United States District Court for the Southern District of Texas and based on that judgment, sought to garnish the assets held by Murphy, but owed to the Congo under those contracts; Walker later requested a turnover order to capture any future assets owed under the contracts. Those assets included a $6,000,000 signing bonus that Murphy pledged to the Congo and the royalty obligations owed by Murphy to the Congo once oil is lifted from the production wells. Although Murphy initially claimed that it had no present obligation to pay any money to the Congo, on June 30, 2004, during the course of litigation, Murphy paid the signing bonus of $6,000,000 to the Congo, and placed an equivalent amount in a surety bond. In addition, Murphy and the Congo negotiated a "framework agreement" in which the Congo would reimburse Murphy's litigation costs in connection with this proceeding from the oil revenues generated under the production sharing contracts.

B. Proceedings Below

On August 14, 2003, the district court granted Walker's motion for issuance of writs of attachment and writs of garnishment against Murphy and its affiliates and four days later, issued a temporary restraining order barring Murphy and its affiliates from making any payments to Congo or its agents and instrumentalities or alter egos. Congo was properly notified of the proceeding, but it did not appear. It did not dispute that it owes Walker more than $26,000,000. It did not dispute that it had entered into production sharing contracts with Murphy to exploit the Congo's oil reserves. The Congo did not dispute that under those contracts, Murphy was obligated to pay a

signing bonus to the Congo and will owe a continuing stream of royalties, production shares and other funds as production begins. The Congo did not dispute that this is commercial activity in the United States. Nor did the Congo dispute that even in connection with this litigation, it had agreed to repay Murphy for its litigation costs out of its share of the royalty stream under the production sharing contracts. In short, the Congo did not dispute that it had assets in the United States, that it was engaged in commercial activity in the United States, or that the bonus and royalties were commercial property. And, it did not assert that it had any immunity from execution against any of its assets under the FSIA. The district court entered a default against the Congo pursuant to Fed. R. Civ. P. 55 for this reason.

Murphy alone participated in the district court proceeding in opposing the relief sought by Walker. Murphy, not the Congo, asserted the Congo's immunity from attachment under the FSIA and also asserted that its agreement with the Congo was not in force and did not yet give rise to any obligation. At no point did Murphy assert that it was authorized or directed by the Congo to raise these "defenses" or to interfere with the Congo's compliance with Art. 28(6) of the ICC Rules.

Based on Murphy's assertion of the Congo's immunity, the district court vacated the temporary restraining order, dissolved the writs, and denied the request for a turnover order.

On appeal, the Fifth Circuit affirmed the district court's decision. Despite the court's conclusion that the Congo affirmatively and explicitly waived its sovereign immunity under the FSIA, both in its contracts with

Murphy, as well as in its agreement to abide by the rules of the ICC in consenting to and participating in the ICC arbitration proceedings, App. 7a-8a, the Fifth Circuit held that the Congo's failure to raise any defense did not preclude Murphy from raising an FSIA defense. App. 5a. According to the Fifth Circuit, nothing in the FSIA "requires the presence of the foreign sovereign or gives the sovereign exclusive standing to raise the waiver element." App. 5a. And, waiver or not, the Fifth Circuit decided that although the property at issue was the debt, it looked to the funds generated by that debt – signing bonuses and other payments – and held that those funds were not "used for commercial activity" under the FSIA and therefore not subject to garnishment. The Fifth Circuit, relying on a test it announced in a prior decision involving another case in which the Congo defaulted on a loan contract, held that how the property was generated does not matter; "[w]hat matters under the statute is what the property is 'used for' . . . property is not thereby subject to execution or attachment if it is not 'used for' a commercial activity within our borders." *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 251 (5th Cir. 2002). The Fifth Circuit decided that the Congo had not used the property sought to be garnished for commercial activity. It found that the Congo and Murphy never reached final agreement on how Murphy's litigation costs would be repaid and, in any event, such "minor reimbursements" were not sufficient. App. 11a. The Fifth Circuit then decided that since there was no evidence in the record showing how the signing bonus was "actually used," the funds could not be deemed to have been "used for commercial purposes." App. 12a.

REASONS FOR GRANTING THE PETITION

This case presents two recurring questions concerning international comity, foreign policy and the role of the federal judiciary in enforcing domestic judgments against a foreign state. These questions go to the heart of whether private commercial entities can enforce United States judgments against foreign states, where the court's Article III jurisdiction to enter the judgment is neither in dispute nor in doubt and the foreign state has waived all immunity. First, does a third-party garnishee indebted to the foreign state as a result of commercial activity have representational standing to raise putative defenses under the FSIA, where the sovereign has declined to do so and has waived its right to do so. Four Circuits are split on this issue with the Second, Ninth, and Eleventh Circuits holding that absent Article III concerns, FSIA immunity is personal to the sovereign, and the Fifth Circuit, in this case, holding that is not.

This Circuit split is vibrant and significant on two levels. First, as a matter of judicial administration, the four Circuits involved in the split account for nearly two-thirds of the reported decisions in FSIA cases heard on appeal (*i.e.*, 114 FSIA cases in the Second Circuit, 55 in the Fifth Circuit, 108 in the Ninth Circuit and 29 in the Eleventh Circuit). Second, the Fifth Circuit's holding in the case *sub judice* leads to perverse results which are at odds with the legal and policy principles embodied in the FSIA. Under the Fifth Circuit's ruling, a private commercial actor can veto a foreign state's decision to waive immunity.

Second, does the FSIA permit a foreign state to waive its rights in property for purposes of execution, where a waiver is not foreclosed by 28 U.S.C. § 1611. The Fifth

Circuit held that although the Congo's waiver was effective and included any property of any type or nature, the FSIA barred it from giving effect to that unconditional waiver until it could ascertain that the Congo intended to use the money generated by the property, *i.e.*, the debt owed to it by the garnishee, for commercial purposes. Under this view, only after the money has been paid over to the foreign state, and may then be removed by that state from the jurisdiction of United States courts, can a court determine whether the money would have been subject to attachment.

The Fifth Circuit's conclusion is not only inconsistent with United States treaty obligations under the New York Convention and the Federal Arbitration Act ("FAA"), but also with established tenets of international law. By failing to even attempt to harmonize the FSIA with the New York Convention and the FAA, the Fifth Circuit effectively repealed provisions of both by implication and in so doing, rendered one section of the FSIA superfluous and another section nonsensical. The plain meaning of the FSIA avoids these pitfalls and harmonizes well with existing treaty obligations, international law, and the FAA.

I. THE COURT OF APPEAL'S RULING THAT FSIA IMMUNITY CAN BE RAISED BY ANYONE CONFLICTS WITH THE HOLDINGS OF THREE OTHER CIRCUITS AND UNDERMINES THE ABILITY OF FOREIGN GOVERNMENTS TO SHAPE THEIR OWN FOREIGN POLICY

A. The Fifth Circuit's Decision Creates a Split Among the Circuits

The Fifth Circuit, in this case, held that the defenses under the FSIA are not personal to the foreign sovereign

and that the "very language of the FSIA makes clear that the [Republic of Congo's] presence is irrelevant." App. at 5a. The Fifth Circuit believed that it was writing on a clean slate: "we were unable to find any authority for the proposition that it is the sovereign's exclusive right to raise the issue of sovereign immunity under the FSIA." *Id.* The issue, though, is not novel, as the Fifth Circuit erroneously believed. The Second, Ninth and Eleventh Circuits have all held, contrary to the Fifth Circuit, that, absent Article III jurisdictional concerns, the immunity defenses under the FSIA are personal to the foreign sovereign and may not be championed by others. *See Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1290 (11th Cir. 1999) ("[p]arties other than a foreign sovereign ordinarily lack standing to raise the defense of sovereign immunity" but the court may address the issue independently if its jurisdiction depends on it); *Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026, 1032-33 (9th Cir. 1991) (holding that "respondents are without standing to invoke the FSIA."), *cert. denied*, 503 U.S. 966 (1992); *Republic of Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986) (holding that private, commercial entities "have no standing to assert" the claim of immunity under the FSIA).[1] In *Wilmington Trust*, for example, after a complex business arrangement involving financing from the Finnish Guaranty Board ("FGB") went awry, various participants instituted suit to perfect their respective and conflicting liens. One of the parties invoked the FSIA to

[1] *See also Presbyterian Church of Sudan v. Talisman Energy*, 244 F.Supp.2d 289, 342 n.42 (S.D.N.Y. 2003) ("Certainly, as a sovereign country, Sudan is potentially entitled to immunity under the Foreign Sovereign Immunities Act. . . . However, [defendant] lacks standing to raise an FSIA defense on Sudan's behalf.").

strike a demand for a jury based on an allegation that the FGB was an agency of the Finnish government. The Ninth Circuit did not permit the defense to be raised by a party other than the foreign state, holding that "based on the language of the [FSIA] and its legislative history, Congress intended requests for protection under the FSIA to originate from the foreign state party. Neither Finland nor the FGB is a party in the action. Neither entity has sought to intervene, and neither entity has requested that the FSIA be applied." *Wilmington Trust*, 934 F.2d at 1033. The court concluded that "respondents do not have standing to invoke the FSIA." *Id.*

The Fifth Circuit's view confuses a court's subject matter jurisdiction with defenses not linked to that court's jurisdiction. When the court's subject matter jurisdiction rests on whether a foreign sovereign is immune, the court may, and indeed should, address the issue independently and if necessary, *sua sponte*. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983). That, however, is not the case here. The district court had proper subject matter and personal jurisdiction over the Congo; the court properly entered a default judgment against the Congo and later the district court in Texas issued by default writs of garnishment with respect to the property at issue here; no one has ever contested the court's subject matter jurisdiction under 28 U.S.C. § 1330 or for that matter, under 9 U.S.C. § 203. Instead, the garnishee argued, and the Fifth Circuit agreed, that the garnishee could interpose non-Article III defenses to the same extent as could the Congo unencumbered by Congo's express waiver of sovereign immunity.

B. The Court's Holding Undermines the Purposes of the FSIA

1. The Court's Ruling Interferes with a Sovereign's Foreign Policy Objectives

Not only does the Fifth Circuit's holding create a clean break from the holdings of its three sister circuits, it also turns things topsy-turvy by transforming a law designed to promote international comity where "our courts will not inquire into the validity of an act of a recognized foreign state," *Ioannout v. New York*, 371 U.S. 30, 31 (1962), especially where that state seeks to waive certain protections to gain a financial advantage, into a law that promotes paternalism where only United States courts and United States commercial entities know best how to protect the fisc of a foreign state. The FSIA was designed to have precisely the opposite effect by regularizing the law of immunity so that foreign states and commercial actors would know, in advance, the types of activities that were protected and the types that were not; commercial activity cannot thrive in a world of legal uncertainty where a foreign state's ability to make commercial and foreign policy decisions can be usurped willy-nilly by private actors and where a state's valid contracts can be voided by non-parties. *See Quill Corp. v. North Dakota,* 504 U.S. 298, 316 (1992) (bright line "encourages settled expectations and, in doing so, fosters investment by businesses and individuals."); *Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.3d 363, 380 (2d Cir. 1999). Underlying the FSIA is the basic notion that foreign states, as a matter of shaping their own foreign policies, ought to be able to determine for themselves when to forsake immunity in favor of promoting commercial or foreign policy objectives. *See Verlinden*, 461 U.S. at 493 (commenting

that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States.").

Here, the Republic of Congo made such a choice and waived its immunity under the FSIA to promote certain commercial objectives, *i.e.*, to restructure the debt owed to its contractor, Sadelmi. The Fifth Circuit, however, has not only declined to give effect to that sovereign decision, but also would shift that decision-making to private parties. In so doing, it is interfering with Congo's foreign policy decision even though no Article III concerns are present or have ever been articulated. *See Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817-18 (1976) (holding that federal courts have a "virtually unflagging obligation" to exercise jurisdiction over all cases properly before them).

2. The Potential Profound Adverse Impact of the Decision Below on the Viability of the Capital Market Warrants this Court's Attention

In this case, the Fifth Circuit permitted a third party to raise a foreign state's defense under the FSIA to a judgment creditor's efforts to obtain repayment of an undisputed, valid debt when that foreign state not only agreed to a blanket waiver of sovereign immunity, but agreed not to raise any defense of immunity. Moreover, the Fifth Circuit has held that judgment creditors cannot execute against intangible property, such as a debt or an obligation to make royalty payments unless they can prove that the royalty payments will be used for a commercial purpose in the United States, an impossible burden. The practical effect of the court's rule either is to confer absolute

immunity from execution on intangible property owed to a foreign state or to inject uncertainty into loan transactions with a foreign state.

Either effect will impair and possibly eliminate the market for commercial financing of sovereign debt, and as such, would have an untoward effect on both primary and secondary capital markets for developing countries. The primary market provides short, medium and long-term financing to developing countries either through credit provided by development project contractors, such as Sadelmi, or through banks and other commercial lending institutions. The secondary market provides liquidity needed for private financial institutions in those countries, such as banks, insurance companies and pension funds. Voluntary financing from private creditors provides essential capital for these markets. Participants in the sovereign debt market depend on certainty and predictability, the twin goals of the FSIA and a particular interest of the United States. *See* H.R. Rep. 94-1874 (1976), *reprinted in* 1976 U.S. Code and Cong. Admin. News 6604, 6605-06, 6617; *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) (recognizing that "[t]he United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders."); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 519 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985) ("U.S. policy on foreign sovereign debt requires that "obligations to pay . . . remain valid and enforceable."). Without these protections, financing the debt of emerging market countries will become more expensive, if it occurs at all. *See Karaha Bodas v. Perusahaan Pertambangan*

Minyak, 364 F.3d 274, 281 (5th Cir. 2004) (recognizing, in the context of an ICC proceeding, the importance of orderliness and predictability to viability of international trade); *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d at 380 (recognizing that upsetting settled expectations in the global capital markets "add[s] significantly to the risk of making loans to developing nations with poor credit ratings" which "would naturally be reflected in higher borrowing costs to such nations" and "could even make loans to some of them unobtainable."). *See also* Buchheit, "Sovereign Debtors and Their Bondholders," UNITAR TRAINING PROGRAMMES ON FOREIGN ECONOMIC RELATIONS at 24 (noting that returning to the legal climate that existed before the enactment of the FSIA "would almost certainly diminish the amount, and raise the cost, of the private capital that will be made available to emerging market borrowers in future years.").[2]

The Congo has long been viewed as a scofflaw, intent on avoiding payment of undisputed obligations while government officials diverted billions of dollars to their own use. *See* Dep't of Energy, "Country Analysis Briefs: Congo-Brazzaville," http://www.eia.doe.gov/emeu/cabs/congo.html (March 2002). The commitment to waive sovereign immunity and to abide by the international rules of arbitration are important protections bargained for by parties in the commercial market in this and many other situations. *See National Union Fire Ins. Co. v. People's Rep. of Congo*, No. 91-CV-3172 (N.D. Ill.); *Connecticut Bank v. Republic of Congo*, 309 F.3d 240; *FG Hemisphere Assocs. LLC v. Republique du Congo*, No. 02-CV-04261 (S.D. Tex.), *appeal*

[2] This document is available at http://www.unitar.org/fer/sovereign.pdf.

pending, No. 04-20965 (5th Cir.); *National Union Fire Ins. Co. v. People's Rep. of Congo*, No. 3:04-CV-2440-R (N.D. Tex.). By allowing private parties to invoke defenses otherwise expressly waived by foreign sovereigns, the Fifth Circuit's decision undermines not only the market for lending to the Congo, but to every sovereign borrower in every developing country.

C. The Court's Ruling is Inconsistent with this Court's Representational Standing Jurisprudence

The Fifth Circuit suggests that there is no impediment to the garnishee raising the debtor's putative FSIA defenses even though those defenses must be raised representationally. This Court, however, has consistently held that representational standing is disfavored and that there is a "background presumption . . . that litigants may not assert the rights of absent third parties." *Food & Commercial Workers v. Brown Group*, 517 U.S. 544, 557 (1996). *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S., No. 02-1624 (U.S. June 14, 2004) (Rehnquist, CJ., O'Connor and Thomas, JJ., concurring) (recounting that there is a "general prohibition on a litigant's raising another person's legal rights" (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984)). The considerations underlying the presumption against representational standing are at their strongest, where, as here, a private party seeks to insinuate itself into the foreign policy apparatus of an absent foreign nation and to raise issues that the sovereign had previously decided to forsake – in this case, in order to obtain much needed capital or debt restructuring. The very purpose of the FSIA, to balance commerce and foreign policy, would be undermined if private commercial

parties could stand in the shoes of the sovereign and effectively undermine the sovereign's foreign policy objectives. *See generally American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (preempting California's Holocaust Victim Insurance Relief Act of 1999 as interfering with President's ability to craft foreign policy).

The Fifth Circuit's decision not only clashes with this fundamental policy consideration, but also with this Court's well-developed corpus of law limiting representational standing. To rebut the presumption against representational standing, the garnishee must point to a legally cognizable duty or authorization (*e.g.*, trustee-beneficiary) that would support representational or third-party standing. Here, there can be no duty or authorization for any one of four independent reasons.

First, in representational standing cases, the litigant-representative can only press those claims and defenses that could be raised by the absent third party. *See Acorn v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999) (holding that the represented entities must have standing in their own right). The district court pursuant to Fed. R. Civ. P. 55, entered a default against the Congo and the Fifth Circuit expressly found that the Congo had explicitly waived all immunity under the FSIA. *See* App. at 8a. Following the entry of this default, the Congo, as the defaulted party, "has no standing to participate in the further adjudication of issues." *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 336 (2d Cir. 1986) (citing 6 MOORE'S FEDERAL PRACTICE 55.03[2] (1985)). Before the Congo, as a defaulted party, can participate in the proceedings, it must successfully move to have the default set aside under Fed. R. Civ. P. 55(c). The Congo filed no such motion with the district court and therefore, it lacked statutory standing to

contradict the allegations in Petitioner's motion that all of the conditions under 28 U.S.C. § 1610(c) necessary to permit a court to execute on a foreign sovereign's property were satisfied, *e.g.*, the sovereign was served, waived its rights and the property was in commercial use in the United States. All facts alleged in the motion and the accompanying papers are deemed admitted where, as here, a party defaults. *See United States v. Pope*, 323 U.S. 1, 12 (1944); *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1997) (entry of default effects an admission of all well-pleaded allegations of the complaint by the defaulted party); *United States v. Ponte*, 246 F.Supp.2d 74, 76 (D.Me. 2003) . Therefore, since the Congo had no ability to press the issue, the garnishee has no representational or third-party standing to press that issue either.

Second, as the Fifth Circuit correctly found, the ICC Rules obligated the Congo to waive any immunity from garnishment that its property might otherwise enjoy. Inasmuch as it waived that immunity, there can be no duty owed by any party to argue to the contrary; the sovereign waived that immunity and that waiver cannot be contravened by a private party or annulled by a court. *See* 28 U.S.C. § 1610(a)(1). To do so would not only undermine notions of prudential standing, but also would effectively undermine one of the fundamental attributes of a sovereign nation – the authority to make a governmental decision (*e.g.*, waive immunity) and not have that decision questioned or reversed by private parties in distant lands.

Third, even if a garnishee were under some state law duty to press any defenses that could otherwise be raised by the debtor, that state law, if applied to a sovereign, would be inconsistent with and therefore preempted by the FSIA. *See* 28 U.S.C. § 1602 ("Claims of foreign states to

immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter"); *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 438 (1989) (FSIA "intended to preempt any other State and Federal law . . . for according immunity to foreign sovereigns"); *Lander v. Hartford Life & Annuity Ins.*, 251 F.3d 101, 117 (2d Cir. 2001) ("FSIA preempts all other laws purporting to set rules governing suits against foreign sovereigns").

Fourth, even if there were no bar to the existence and application of a duty, Texas law neither requires nor authorizes a garnishee to raise all defenses that could be raised by the defendant. To the contrary, absent a trustee-beneficiary relationship, a garnishee has no standing to raise ancillary defenses on behalf of the defendant, such as FSIA immunity. *See Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 615-16 (Tex. App. 1998).

II. BY PROHIBITING A FOREIGN STATE FROM WAIVING IMMUNITY, THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH TREATY OBLIGATIONS, THE FEDERAL ARBITRATION ACT, AND THE PLAIN MEANING OF THE FSIA

A. The Relationship Between the FSIA, the FAA, and the New York Convention

The question of a foreign sovereign's immunity from litigation in U.S. courts has evolved since 1812, when Chief Justice Marshall first observed that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement. *Schooner Exch. v. McFaddon*, 7 Cranch 116 (1812). Until 1952, a foreign sovereign's immunity was deemed to be absolute. *See Verlinden B.V. v.*

Central Bank of Nigeria, 461 U.S. at 486. If a question arose as to a sovereign's immunity, the courts deferred to the Executive Branch's judgment. *See e.g.*, *Mexico v. Hoffman*, 324 U.S. 30, 37 (1945); *Ex Parte Rep. of Peru*, 318 U.S. 578, 588-89 (1943).

In 1952, the State Department announced that it would apply the "restrictive theory" of sovereign immunity. Under this approach, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 2248 (2004), *quoting* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney Gen. Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't State Bull. 984-85 (1952), and *Alfred Dunhill of Long, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976).

In 1976, Congress enacted the FSIA, which reflects the United States' current approach to foreign sovereign immunity and "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. at 443. Under the FSIA, foreign states are immune from suit in the United States unless the suit falls within a specific exception set forth in the FSIA, 28 U.S.C. §§ 1604, 1605. Under section 1605(a)(1), a foreign state is not immune when "the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." Under section 1605(a)(2), a foreign state is not immune when "the action is based upon a commercial activity carried on in the United States by the foreign

state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Where there is no immunity, with the exception of punitive damages, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

The FSIA also addresses whether property of a foreign state may be attached or executed against to satisfy a judgment. In establishing these rules, sections 1609 and 1610 parallel sections 1604 and 1605. Under the FSIA, property "used for a commercial activity in the United States" is not immune from attachment in aid of execution, or from execution if the foreign state or an agency or instrumentality of the foreign state has waived its immunity. 28 U.S.C. § 1610(a)(1), (b)(1). Section 1611 provides the only exceptions to the type of property that is subject to waiver of immunity by a foreign state or instrumentality. Notwithstanding the provisions of section 1610, property of a foreign central bank or monetary authority held for its own account (unless expressly waived), property intended to be used or used for military purposes, or property used for an accredited diplomatic mission for official purposes is immune from attachment and from execution. 28 U.S.C. § 1611(b), (c).

On September 30, 1970, the United States Senate acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention"). *See* 21 U.S. T. 2517 (1970). Congress implemented the Convention by amending the

FAA to expressly incorporate the New York Convention. *See* Pub. L. No. 91-368, 84 Stat. 692, codified at 9 U.S.C. §§ 201-208. The FAA specifically states that "[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. § 201.

Under the New York Convention, a signatory state, such as the United States, is obligated to enforce foreign arbitration agreements and subsequent awards, subject to certain limited exceptions which are not applicable here. In this case, the Congo agreed to arbitrate any dispute arising under the contract assumed by Walker in the ICC. Under the ICC's rules, the Congo waived its post-award "right to any form of recourse insofar as such waiver can validly be made." Art. 28(6), ICC Rules of Arbitration.

B. The Fifth Circuit's Decision Conflicts with the Plain Meaning of the FSIA

At the core of the FSIA is the distinction between commercial activities, on the one hand, which do not enjoy immunity and are subject to judicial scrutiny under 28 U.S.C. § 1330, and sovereign activities, on the other hand, which enjoy immunity. This distinction is carried forward with respect to property that is subject to attachment to satisfy an outstanding judgment. Under the FSIA, commercial property is subject to execution, but property that is governmental, and therefore not commercial, is generally not subject to execution. This Court has stated it is the "nature" of the transaction or activity at issue, not its purpose, that matters. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). The Fifth Circuit held that in

order to be subject to execution in aid of a judgment, the proceeds from a debt owed by a garnishee to the Congo must be used by the Congo in the United States for commercial activity. The Fifth Circuit's holding is not only inconsistent with the plain language of the FSIA, "but would [also] thwart the congressional design [and] lead to absurd results." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992).

This Court has consistently counseled that in any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." *Staples v. United States*, 511 U.S. 600, 605 (1994); *see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself"). The Court has instructed "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The FSIA authorizes execution in aid of judgment against any property of the foreign state in the United States "used for commercial activity in the United States." 28 U.S.C. § 1610(a). The Fifth Circuit correctly characterized the "property" subject to garnishment as the "debt" owed by the garnishee to the Congo. Rather than examining the "nature" of the debt to ascertain whether it constituted commercial activity in the United States, the Court examined how the Congo intended to use the payments that it received from the debt. Under the ruling, the purpose to which the payments were directed would determine its character – commercial or otherwise: If the Congo intended to use those payments for commercial activity in the United States, then they could

be garnished; otherwise they would not be subject to garnishment.

The decision, however, flies in the face of the cardinal precept of the FSIA, namely that the character of an activity is determined by examining its "nature" and not "in reference to its purpose." 28 U.S.C. § 1603(d); *Weltover*, 504 U.S. 607. Here, the nature of the debt was inherently commercial – its genesis was commercial, its up-bringing was commercial, and its adulthood was commercial. Nothing about the debt involved "sovereign" characteristics and the Fifth Circuit pointed to none.

By focusing on how the payments either will be used or had been used in the past, the decision leads to absurd results. For example, under the Fifth Circuit's reasoning, garnishment would never be possible if the debt were either new or would be liquidated in one or two payments. In the case of a new debt, there would be no track record of how the sovereign used the payments it received in the past and therefore, no way under the Fifth Circuit's holding, to label the debt as property used for commercial activity. Thus, under the Fifth Circuit's holding, new debts or debts with minimal repayment history could never be subject to garnishment under the FSIA. The FSIA however does not contain a "new debt" exception to its provision authorizing execution any more than it contains a "one or two payment" exception.

The Fifth Circuit's holding also makes 28 U.S.C. § 1611 superfluous. Under the FSIA, immunity cannot be waived with respect to only two types of property: (i) military property, and (ii) embassy property. *See* 28 U.S.C. § 1611. Military and embassy properties are, by their very nature, not held for commercial purposes. By implication,

Congress recognized that without section 1611, a waiver could extend to these inherently non-commercial properties. In the Fifth Circuit's view, section 1611 is not necessary to protect these non-commercial properties, because a foreign state is barred from waiving its immunity under section 1610 even with respect to certain commercial properties. "This line of reasoning proves too much, for it would make the § [1611] exclusion provision superfluous." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). *See also Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment").

Review by this Court is necessary to resuscitate section 1611 and to underscore that courts must give effect to a foreign state's waiver of immunity subject to the limitations of section 1611.

C. The Fifth Circuit's Decision Conflicts with United States Treaty Obligations and the Federal Arbitration Act

The Fifth Circuit's strained interpretation of the FSIA, aside from rendering an entire section superfluous, places the FSIA in conflict with the Federal Arbitration Act and with the New York Convention.

The FAA has been expansively interpreted to promote enforcement of arbitration clauses and subsequent awards. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105. The arbitration agreement and subsequent award, in this case, require the foreign state to waive any defenses that it might have to enforcement of the award. Indeed,

the Fifth Circuit concluded that the Congo's waiver was effective, within the meaning of the FSIA. *See* App. at 8a.

Under the New York Convention, a United States court is obligated to enforce the arbitration and subsequent award of an arbitral body sitting in a signatory country, in this case, France. As part of the arbitration agreement and award, Congo waived any defenses that it might otherwise have. Consistent with that waiver, the Congo has not participated in these proceedings and has not sought to challenge the writs of garnishment. Nonetheless, the Fifth Circuit has refused to enforce the Congo's waiver, holding that it lacks the authority under 28 U.S.C. § 1610, even though it had authority under 9 U.S.C. §§ 201-208 to enforce the waiver. Under principles of international law, and common sense, a state may waive all rights with respect to execution against all property, except diplomatic property or accounts, military property, national bank property, and museum-related property.[3] United Nations International Law Commission, DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, Art. 18-19 (1991), II(2) YEARBOOK OF INTERNATIONAL LAW COMMISSION (1991). The Congo's property falls within none of these exceptions. By failing to enforce the Congo's waiver, the Fifth Circuit has effectively repealed by implication, with nary a reason, both the FAA and the New York Convention, and has adopted a rule of law at odds with accepted principles of international law. Not only are "repeals by implication not favored" (*Morton v. Mancari,* 417 U.S. 535, 549 (1974)), they

[3] These exceptions – other than the one relating to museum property – closely parallel the exceptions set out in 28 U.S.C. § 1611.

are especially disfavored when a treaty obligation is the target of the implicit repeal. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984), this Court emphasized that "'[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed'" (*quoting Cook v. United States*, 288 U.S. 102, 120 (1933)). No such expression of congressional intent was found by the Fifth Circuit and none exists.

Conversely, "if a court can by any fair interpretation find a reasonable field of operation for two allegedly inconsistent statutes without destroying or preventing their intent or meaning from being operative, the court should do so." SUTHERLAND STAT. CONST. § 45.12 (5th ed. 1992); *see Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 512 (1990). Consistent with these principles of statutory construction, this Court has read the FAA to harmonize with other statutes thereby avoiding the specter of repeal by implication. *See Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The Fifth Circuit departed from these principles and made no attempt to harmonize the New York Convention, the FAA and the FSIA.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-20301

WALKER INTERNATIONAL HOLDINGS LIMITED,

Plaintiff – Appellant,

versus

THE REPUBLIC OF CONGO;
CAISSE CONGOLAISE D'AMORTISSEMENT

Defendants – Appellees,

and

MURPHY EXPLORATION &
PRODUCTION COMPANY INTERNATIONAL

Garnishee – Appellee.

Appeals from the United States District Court
For the Southern District of Texas

(Filed December 22, 2004)

Before SMITH and GARZA, Circuit Judges, and VANCE*, District Judge.

EMILIO M. GARZA, Circuit Judge:

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* District Judge of the Eastern District of Louisiana, sitting by designation.

The Republic of Congo ("ROC") refuses to pay a judgment it owes Walker International Holdings Limited ("Walker"). In an effort to collect its judgment, Walker filed a garnishment action against Murphy Exploration & Production, International ("Murphy"), which owed the ROC money. Walker appeals the district court's decision dismissing the action and vacating a temporary restraining order ("TRO") and writs of attachment and garnishment. We previously ordered a stay of the district court's order pending this appeal. Walker claims that under the Foreign Sovereign Immunities Act ("FSIA"), the pro pert y is attachable because it is "used for a commercial activity in the United States." We find that the district court correctly vacated the TRO, dissolved the writs of attachment and garnishment, and dismissed the action.

I

The ROC and Sadelmi Cogepi SpA ("Sadelmi"), an Italian company, entered into a contract for the construction of electric infrastructure in the ROC. Sadelmi completed the construction and the ROC defaulted on its payments. Walker purchased the debt fro m Sadelmi in an assignment agreement. Under the terms of the contract between Sadelmi and the ROC, Walker brought an arbitration proceeding before the International Chamber of Commerce ("ICC") in Paris, France. The ICC found that the ROC was liable to Walker. After French courts upheld the award, Walker registered the $26,093,251 award in the United States District Court for the District of Columbia. Walker then filed a garnishment action in the Southern District of Texas against Murphy to obtain signing bonuses and other payments that Walker suspected Murphy owed the ROC and its national oil company,

Societe Nationale des Petroles du Congo ("SNPC"). In addition, Walker filed a motion for a TRO to prevent Murphy from making any payments to the ROC or SNPC. Murphy filed motions to vacate the TRO, to dissolve writs of attachment and garnishment, and to dismiss.

The magistrate judge granted these motions on the basis that the property was not "used for commercial activity" under the FSIA. Walker appealed, and this court upheld a stay pending appeal. Murphy paid the ROC its signing bonus payment and placed the equivalent, $6,360,000, into a surety bond which requires payment to Walker on "any final, non-appealable judgment that Walker . . . obtains in [this] garnishment action. . . ."

II

The parties first contend that three arguments determine the controversy *without* FSIA analysis. We find that these arguments lack merit. First, Murphy asserted in oral argument that the writ of garnishment was filed prematurely and, hence, there was nothing to attach. Murphy failed to brief this argument. Therefore, the argument is deemed waived. *United States v. Thames*, 214 F.3d 608, 612 n.3 (5th Cir. 2000).

Second, Walker argues that it is entitled to the surety bond because it is not the property of the ROC and, hence, the FSIA is inapplicable. Walker cites *Flatow v. Islamic Republic of Iran*, 74 F.Supp.2d 18 (D.D.C. 1999), which ruled that property held by the United States as an award to Iran was property of the United States, and therefore not subject to attachment under the FSIA. In *Flatow*, the plaintiff sought to garnish U.S. Treasury funds earmarked for payment of Iran-United States Claims Tribunal

awards. The court denied garnishment because "creditors may not attach funds held by the U.S. Treasury or its agents." *Id.* at 21. The court reasoned, "In other words, funds held in the U.S. Treasury – even though set aside or 'earmarked' for a specific purpose – remain the property of the United States until the government elects to pay them to whom they are owed." *Id.* Here, Liberty Mutual Insurance Company, a private corporation which does not enjoy sovereign immunity, holds the surety bond. Therefore, the *Flatow* analysis is inapplicable.

Third, Walker claims that the bond requires payment to Walker on "any final, non-appealable judgment that Walker International Holdings Limited obtains in the garnishment action styled *Walker International Holdings Limited v. The Republic of Congo, et al.*, Civil Action No. 03-CV-3497 (S.D. Tex.)." Walker argues that since there was a judgment, payment is required. Walker's argument fails because Civil Action No. 03-CV-3497 is, of course, on appeal here.

Walker also makes a standing argument: specifically, it argues that only the ROC has standing to raise the issue of the ROC's sovereign immunity. In response, Murphy contends that under Texas garnishment law, it had a duty to raise any known defenses of the judgment debtor. This and Walker's standing argument are irrelevant to the FSIA. Walker cites *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994) ("It is the burden of the foreign sovereign in each case to establish its immunity by demonstrating that none of the exceptions is applicable."). *Princz* is irrelevant for our purposes. In *Princz*, the plaintiff sued the foreign sovereign directly; it was not a garnishment action involving an additional party. There was

no need for the *Princz* court to make a distinction between the foreign sovereign and third parties.

Walker cites no authority and we were unable to find any authority for the proposition that it is the sovereign's *exclusive* right to raise the issue of sovereign immunity under the FSIA. In fact, the very language of the FSIA makes clear that the ROC's presence is irrelevant: "The property in the United States of a foreign state . . . shall not be immune from attachment . . . if – (1) the foreign state has waived its immunity . . . either explicitly or by implication." 28 U.S.C. § 1610(a). The FSIA sets parameters in which property may be attached: "the court may order the attachment or execution *only* as 'referred to in subsections (a) and (b).'" *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 250 (5th Cir. 2002) (emphasis added). Neither 28 U.S.C. § 1610(a) nor (b) requires the presence of the foreign sovereign or gives the sovereign exclusive standing to raise the waiver element. Hence, we find no merit to Walker's standing argument and we need not address Murphy's response.

III

Finding the FSIA applicable, we turn to whether the ROC waived its sovereign immunity "either explicitly or by implication." 28 U.S.C. § 1610(a)(1). When a district court's decision involves mixed questions of law and fact, we review the factual findings for clear error, and legal conclusions and application of law to fact *de novo*. *Af-Cap v. Republic of Congo*, 383 F.3d 361, 368 (5th Cir. 2004) *reh'g granted*, 389 F.3d 503 (per curiam).

The FSIA codifies the restrictive theory of foreign sovereign immunity and is the only basis for obtaining *in*

personam jurisdiction over a foreign sovereign. *In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001). This statutory immunity is subject to several exceptions.

The relevant provision states

> The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, *used for a commercial activity in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –
>
> (1) the foreign state has *waived its immunity* from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver. . . .

28 U.S.C. § 1610(a) (emphasis added). Therefore, a waiver of immunity only applies "against property that meets . . . two statutory criteria," namely, that the property in question be "in the United States" and "used for commercial activity in the United States." *Af-Cap*, 383 F.3d at 365 (citations omitted).

A

Walker contends that the ROC waived its sovereign immunity explicitly in its contracts with Murphy. "An explicit waiver must be an intentional and knowing relinquishment of the legal right." *Good v. Aramco Services Co.*, 971 F.Supp. 254, 258 (S.D.Tex. 1997). In *Atwood*

Turnkey Drilling, Inc. v. Petroleo Brasileiro, 875 F.2d 1174 (5th Cir. 1989), we found that the national oil company of Brazil had waived its immunity in its financing agreement. The provision stated

> The Borrower ... expressly and irrevocably waives any such right of immunity (including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise) or claim thereto which may now or hereafter exist, and agrees not to assert any such right or claim in any such action or proceeding, whether in the United States or otherwise.

Id. at 1177. Similarly, the ROC signed an agreement that waives sovereign immunity defenses. The Production Sharing Contract states, "[t]he Congo hereby irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision handed down by an Arbitration Court. . . ." The plain language of "any immunity" indicates that sovereign immunity is also waived. Murphy does not argue, and this court has found no authority, suggesting the contrary. This "procedure" relates to the "arbitration decision" since Walker seeks to garnish funds owed to the ROC to collect on the ICC's judgment.

In addition, the ROC agreed to abide by the rules of the ICC which precludes the ROC from asserting a sovereign immunity defense. Rule 28(6) states, "[e]very Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." I.C.C. RULE 28(6).

Therefore, we hold that the ROC explicitly waived its sovereign immunity. Accordingly, we need not address a potential implicit waiver.

B

Having found waiver, we turn to the second requirement of the FSIA: whether the property is in the United States. 28 U.S.C. § 1610(a). Walker argues that the property was in the United States because (1) pledges to induce payments by an American company constitute commercial activity in the United States, and (2) the ROC contracted for legal services in the United States to defend this garnishment action. Murphy, on the other hand, claims that the pledged petroleum is repaid by oil in the ground in the ROC and, hence, is not in the United States. Further, Murphy claims that Walker's assertions lack evidentiary support.

In *Af-Cap v. the Republic of Congo*, 383 F.3d 361 (5th Cir. 2004), our most recent published decision involving the ROC, the ROC entered into a lending contract with Equator Bank Limited to provide funds necessary for the construction of a highway in the ROC. The ROC pledged as collateral "all of its assets and properties, wherever located." The ROC defaulted, and Connecticut Bank of Commerce ("Connecticut Bank"), an assignee of the contract, obtained a default judgment against the ROC in London, England. After registering the foreign judgment in the United States and obtaining an order of attachment, Connecticut Bank filed garnishment actions in Texas against various entities ("Garnishees") which owed the ROC taxes and royalties. *Af-Cap*, 383 F.3d at 364-65.

The *Af-Cap* court found that debtor obligations were, by nature, intangible and determining the situs required a context specific inquiry. *Id.* at 371. Approvingly, the court quoted an earlier Fifth Circuit decision:

> The situs may be in one place for ad valorem tax purposes, . . . ; it may be in another place for venue purposes, i.e., garnishment . . . ; it may be in more than one place for tax purposes in certain circumstances . . . ; it may be in still a different place when the need for establishing its true situs is to determine whether an overriding national concern, like the application of the Act of State Doctrine is involved.

Id. quoting *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714-15 (5th Cir. 1968). Importantly, we state that "courts consistently hold that the situs of debtor obligation is the situs of the debtor." *Id.*

With a similar factual background to the case at hand, the court in *Af-Cap* concluded, "[w]e think a common sense appraisal of the requirements of justice and convenience in this particular context yields the conclusion that the situs of these royalty obligation is the United States)) the situs of the Garnishees." *Id.* (internal quotations omitted). In *Af-Cap,* the plaintiff was "not seeking to attach any of the Congo's physical property (like its oil) but instead it [sought] to attach the *obligations* to pay royalties owed by the garnishees." *Id.* at 371 n.12 (emphasis in original). Here, the property Walker seeks to attach is a surety bond in the United States. Murphy, the debtor, is also in the United States. Therefore, for the purposes of the FSIA, the surety bond is in the United States.

C

Under the FSIA, a third element must be met: property in the United States must also be "used for commercial activity" for implementation of a waiver of sovereign immunity. 28 U.S.C. § 1610(a). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). Walker argues that the signing bonuses and other payments were used for commercial activity because the ROC pledged oil revenue to pay for various administrative and transactional expenses related to the negotiation of the oil contracts. In addition, Walker argues that the ROC's promise to reimburse Murphy for its litigation expenses constitutes commercial activity. Neither argument is meritorious.

In the original *Af-Cap* appeal, this court held, "[w]hat matters under the statute is what the property is 'used for' . . . even if a foreign state's property has been generated by commercial activity in the United States, that property is not thereby subject to execution or attachment if it is not 'used for' a commercial activity within our borders." *Conn. Bank of Commerce*, 309 F.3d at 251. Thus, the fact that the property was generated by commercial activity, namely, oil exploration, is irrelevant. In vacating and remanding the case back to the trial court, the *Conn. Bank* court wrote, "[i]f it turns out that the royalties and tax obligations are not used for any commercial activity in the United States, the district court should dissolve the writs of garnishment and dismiss the action." *Id.* at 260-61. In *Conn. Bank*'s second appeal, the court found that "the Congo has used at least fifty percent of [the tax and royalty obligations] to repay commercial debt" and therefore concluded that the "tax and royalty obligations are used for commercial

purposes of § 1610(a) of the FSIA." *Af-Cap*, 383 F.3d at 370-71. In reaching its conclusion, the court took a "holistic" approach, considering whether the commercial uses were bona fide exceptions to the noncommercial uses. *Id.* at 369.

In the present case, the district court found that no agreement was ever reached requiring the ROC to reimburse Murphy for its legal expenses. The magistrate judge did not clearly err in finding the factual testimony of the general manager of new ventures for Murphy credible when he testified that the agreements on reimbursement never got further than the negotiation stage. His testimony was bolstered by the lack of a signed finalized agreement requiring reimbursement. There is no legal authority suggesting that negotiations over property make the property "used for commercial activity" under the FSIA.

Walker's next argument, that the property was used for commercial activity because the ROC was to reimburse Murphy for administrative and transactional costs, also fails. The magistrate judge found that "[t]he evidence fails to support the conclusion that [the] ROC spent or attempted to spend the payment obligations in any manner, commercial or otherwise." Even if there were evidence that the ROC paid Murphy for commercial services under this provision, Walker's argument still fails. Murphy was merely able to deduct certain expenses from the amount it owed the ROC; there was no commercial activity separate from the transaction that generated the property in the first place. In addition, contextually and holistically, minor reimbursements would not reach this standard. In *Af-Cap*, the court found that at least fifty percent of the proceeds had been used for commercial activity. *Af-Cap*, 383 F.3d at

370. There is no evidence that the reimbursements would be anywhere near fifty percent.

Beyond assertions of litigation and administrative reimbursements, there is no evidence in the record showing how the signing bonus and other payments were actually used, or even how other bonuses were used in the past. While these funds could indeed be used for other commercial purposes, such as debt service, *see id.* at 368, Walker does not make this assertion. Therefore, no other inquiry into the use of the monies is necessary and, for our purposes, we hold the funds were not "used for any commercial activity."

Walker further argues that the surety bond is commercial paper under the Texas Uniform Commercial Code (TEXAS BUS & COM. § 9-102), and is therefore, by definition, commercial. We find this argument meritless as it would completely undermine the intent of the FSIA. "One of the chief motifs of the FSIA is to limit as much as possible disrupting the 'public acts' or '*jure imperii*' of sovereigns, while restricting their purely commercial activity." *Conn. Bank of Commerce*, 309 F.3d at 253. The *Conn. Bank* court provided the following hypothetical to explain the distinction:

> Consider an airplane owned by a foreign government and used solely to shuttle a foreign head-of-state back and forth for official visits. If the plane lands in the United States, it would not be subject to attachment or execution. The plane is not "used for" any commercial activity, in the U.S. or elsewhere. *It plainly would not matter how the foreign government bought the plane, raised the purchase price, or otherwise came into ownership.*

Id. at 253 (emphasis added). Under Walker's rationale, funds used to purchase a government plane or even an embassy could be subject to attachment depending on the method of payment. "Plainly Congress did not intend a result so inconsistent with recognized principles of international law." *Id.* at 253 n.4 quoting *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36-37 (3d Cir. 1985). Thus, we find the Texas Uniform Commercial Code definition is inapplicable in interpreting the FSIA.

IV

Walker claims that the magistrate judge erred in ruling that there was not enough evidence to find that SNPC was the alter ego or "agent and instrumentality" of the ROC. If SNPC is the ROC's alter ego, it would have to undergo the same immunity analysis as the ROC. If SNPC is an "agent or instrumentality" of the ROC, then § 1610(b) of the FSIA determines whether its property is attachable. Reviewing the sufficiency of evidence is the application of law to facts and is reviewed *de novo*. *Af-Cap* 383 F.3d at 368.

Walker cannot attach the assets of the SNPC under the theory that the SNPC is an "agent or instrumentality" of the ROC. The FSIA defines "an agency or instrumentality" of a foreign state as any entity

> (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section

> 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). The SNPC is a separate legal entity, established by Congolese law in 1998 and is not a citizen of the United States. We need not determine whether the SNPC was "an organ of [the ROC] or political subdivision thereof, or a majority of whose shares is owned by" the ROC because Walker still would not be able to attach its assets.

Under 28 U.S.C. § 1610(b) of the FSIA,

> any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if – (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

Walker does not explain how this section of the FSIA applies to SNPC. Merely being an "agent or instrumentality" of a foreign state is insufficient to attach property under the FSIA. Failing to argue all of the requirements

under the FSIA, Walker's claims under § 1610(b) are deemed waived. *Thames*, 214 F.3d at 612 n.3.

Alternatively, Walker argues that it should be able to garnish SNPC's property under an alter ego theory. Here again, we need not determine whether SNPC is an alter ego of the ROC because its property would still not be attachable. Under the alter ego theory, SNPC's property could only be attached if the ROC's property (currently in the form of the surety bond) could be attached. As explained *supra*, the surety bond cannot be attached because it failed to satisfy the criteria of the FSIA. Accordingly, there is no basis to attach SNPC's property.

V

The magistrate judge correctly found that the garnished funds were not "used for any commercial activity." Accordingly, the district court's decision to vacate the TRO, dissolve the writs of attachment and garnishment, and dismiss the action are AFFIRMED. Walker's motions to order the disbursement of the surety bond and for Murphy to show cause why it should not be held in contempt are DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALKER INTERNATIONAL HOLDINGS LIMITED,	§	
Plaintiff/Garnishor,	§	
v.	§	CIVIL NO. H-03-3497
REPUBLIC OF THE CONGO, et al.,	§	
Defendants,	§	
MURPHY EXPLORATION & PRODUCTION INTERNATIONAL,	§	
Garnishee.	§	

MEMORANDUM OPINION

(Filed February 27, 2004)

Pending before the court[1] are: 1) Garnishee's Motion to Vacate Temporary Restraining Order ("TRO"), to Dissolve Writs of Attachment and Garnishment, and to Dismiss (Docket Entry No. 14); 2) Plaintiff's Motion for Turnover Order (Docket Entry No. 47); 3) Garnishee's Motion to Strike the Declaration of Rodney McCalister (Docket Entry No. 49); 4) Garnishee's Motion to Strike the Declaration of Michael F. Sheehan (Docket Entry No. 50); 5) Plaintiff's Request to Convert TRO to a Preliminary

[1] The parties consented to proceed before the undersigned magistrate judge for all proceedings, including trial and final judgment, pursuant to 28 U.S.C.§ 636(c) and Fed. R. Civ. P. 73. Docket Entry No. 56.

Injunction (Docket Entry No. 51); 6) Plaintiff's Traverse of the Answer of the Garnishee (Docket Entry No. 52); and 7) Garnishee's Motion to Strike the Amended Declaration of Michael F. Sheehan (Docket Entry No. 61).

The court has considered the motions, all relevant filings, and the applicable law. For the reasons set forth below, the court **GRANTS** Garnishee's Motion to Vacate TRO, to Dissolve Writs of Attachment and Garnishment, and to Dismiss and **DENIES** Plaintiff's Motion for a Turnover Order. Based on these two rulings, all other motions are **MOOT**.

I. Case Background

This garnishment action was filed by Plaintiff, as a creditor on a $26,093,251 judgment that was entered by the United States District Court for the District of Columbia against the Republic of Congo ("ROC") and Caisse Congolaise D'Amortissement ("CCA"). The underlying judgment was based on an order confirming an international arbitration award in favor of Plaintiff.

On August 5, 2003, based on press articles reporting that Garnishee had signed oil Production Sharing Agreements ("PSAs") with ROC and its national oil company, Societe Nationale des Petroles du Congo ("SNPC"), Plaintiff filed this action to garnish the signing bonuses and other payments that Plaintiff suspected Garnishee owed ROC and SNPC.[2] A week after the case was filed, the court

[2] Memorandum in Support of Plaintiff/Judgment Creditor's Motion for Issuance of Writs of Attachment and Garnishment in Aid of Execution on Judgment, Docket Entry No. 3, pp. 4-5. Although Garnishee admits that one of its subsidiaries is a party to the PSAs, it denies that

(Continued on following page)

issued an ex parte order granting Plaintiff's motion for the issuance of writs of attachment and garnishment.[3] Shortly thereafter, Plaintiff filed an emergency motion for a TRO to prevent Garnishee from making any payments to ROC or SNPC.[4] On August 18, 2003, the court granted the motion ex parte, but required Plaintiff to file a $10,000 bond.[5]

The Writ of Garnishment was served on Garnishee on August 20, 2003.[6] Garnishee answered, denying that it or any of its subsidiaries was indebted to ROC or its agents, instrumentalities, emanations, or alter egos as of the date of garnishment. Garnishee immediately filed the pending Motion to Vacate the TRO, to Dissolve the Writs of Attachment and Garnishment, and to Dismiss the Action. The court granted Plaintiff's motions to compel expedited discovery and to extend the TRO.[7] Two months later, the court granted Plaintiff's additional motions to compel and reviewed documents submitted for in camera inspection as to privilege.[8] In December 2003, Plaintiff filed a Motion for Turnover Order and a Motion for Entry of Default as to

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all of the necessary steps have been completed to give rise to any payment obligations. Garnishee's Verified Original Answer, Docket Entry No. 13, ¶ 5.

[3] Order, Docket Entry No. 5.

[4] Emergency Motion for Temporary Restraining Order, Docket Entry 6.

[5] Order, Docket Entry No. 8.

[6] Garnishee's Verified Original Answer, Docket Entry No. 13, ¶ 1.

[7] Hearing Minute Entry Order, Docket Entry No. 16; Order, Docket Entry No. 17.

[8] Minute Entry, Docket Entry No. 36.

ROC and CCA. The court granted Plaintiff's Motion for Entry of Default.[9]

The court now considers Garnishee's Motion to Vacate the TRO, to Dissolve the Writs of Attachment and Garnishment, and to Dismiss the Action and Plaintiff's Motion for Turnover Order.

II. Analysis

Both of the above motions relate to Plaintiff's efforts to enforce its judgment against ROC and CCA through Texas proceedings in aid of execution. The parties debate a variety of issues in their briefs; however, two overriding matters emerge. The first, which is the focus of much of Plaintiff's discovery, is whether Garnishee actually owes ROC any debt. The second is whether the Foreign Sovereign Immunities Act ("FSIA") affords immunity from execution in this case. The court finds the second issue to be the threshold consideration. As it turns out, it is also the determining factor for both motions.

Congress enacted the FSIA to "serve the interests of justice and [to] protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. Congress divided the statute into two separate grants of immunity, immunity from jurisdiction (28 U.S.C. §§ 1604-1607) and immunity from attachment and execution of property (28 U.S.C. §§ 1609-1611). Both for jurisdiction over foreign states and for attachment of their property, the presumption is immunity, subject only to certain enumerated exceptions. *See* 28 U.S.C. §§ 1604; 1609. In

[9] Order, Docket Entry No. 54.

general terms, the statute protects foreign states from jurisdiction for suits based on the foreign states' public acts, but not those based on commercial acts. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 5th Cir. 2002). To a greater degree, the FSIA protects foreign states' property from execution.[10] *See id.* at 252-53. Only a foreign state's property which is used for a commercial activity in the United States may be attached in satisfaction of a judgment. 28 U.S.C. § 1610(a); *see also Conn. Bank of Commerce*, 309 F.3d at 247.

In the words of the statute, "(t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State," provided that at least one of seven conditions is met. 28 U.S.C. § 1610(a). Similar but less restrictive exceptions to immunity apply to property belonging to agencies or instrumentalities of foreign states. 28 U.S.C. § 1610(b).

Here, Plaintiff tries to convince the court that none of these requirements matter because Garnishee lacks standing to assert the FSIA as a defense to execution. By so arguing, Plaintiff demonstrates a serious misunderstanding as to the duty that the statute places on this

[10] Prior to the FSIA, foreign states enjoyed complete immunity from execution of their property. *Conn. Bank of Commerce*, 309 F.3d at 252; H.R. Rep. 94-1487, at 27 (1976). At that time, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action. *Conn. Bank of Commerce*, 309 F.3d at 255-56; *see also* H.R. Rep. 94-1481, at 27 (1976).

court. Under the FSIA, the court may order attachment in aid of execution of a foreign state's property *only* if one of the exceptions listed in 28 U.S.C. § 1610(a) or (b) is met (and a reasonable period of time has transpired since entry of judgment). 28 U.S.C. § 1610(c); *Conn. Bank of Commerce*, 309 F.3d at 250 (noting that 28 U.S.C. § 1610(c) allows a court to order attachment or execution only if an exception to immunity applies). The statutory language evidences Congress' intent to place limits on the court's power to attach a foreign state's property, regardless of the foreign state's efforts to defend the property. This court is not free to avoid the statutory analysis simply because ROC has not appeared in the suit to assert FSIA immunity itself.[11]

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[11] To support its position, Plaintiff relies on the following statement in the FSIA house Report: "(S)ince sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity." H.R. Rep. 94-1487, at 17 (1976). This statement referred specifically and exclusively to 28 U.S.C. §1604, which deals with a foreign state's immunity from jurisdiction. The interplay between this statement by Congress, the FSIA's waiver exception to jurisdictional immunity, and the jurisdictional statute at 28 U.S.C. § 1330 is fascinating, but completely immaterial to the analysis required of the court in determining whether a foreign *state's* property can be attached. *Cf. MCI Telecomms. Corp v. Alhadhood*, 82 F.3d 658, 662 (5th Cir. 1996) (stating that waiver of jurisdictional immunity can be implied from failure to raise it in a responsive pleading, but not from a foreign state's failure to appear); *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993) (stating that failure to raise the immunity to jurisdiction defense in a responsive pleading is an implicit waiver under 28 U.S.C. § 1605 (a)); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (explaining how failure to raise immunity in a responsive pleading equates with implicit waiver of immunity from jurisdiction). None of the cases cited by Plaintiff stand for the proposition that a foreign state must raise immunity from execution as an affirmative defense in an action for the enforcement of

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That argument failing, Plaintiff contends that the FSIA allows the court to attach and garnish the bonus and royalty payments allegedly owed by Garnishee to ROC and SNPC. Plaintiff offers two theories. Plaintiff argues that ROC is not entitled to immunity because one or more exceptions listed in 28 U.S.C. § 1610(a) applies. Second, Plaintiff contends that SNPC is an agency or instrumentality subject to one of the exceptions in 28 U.S.C. § 1610(b).

28 U.S.C. § 1610(a)

Plaintiff's first theory is that, under 28 U.S.C. § 1610(a), the bonus payments are property used for a commercial activity in the United States and ROC has waived its immunity from attachment in the aid of execution[12] and/or the judgment Plaintiff seeks to enforce is based on an order confirming an arbitral award.[13] *See* 28 U.S.C. § 1610(a)(1) and (a)(6). The court finds that it must start by determining whether the bonus payments and royalty obligations are property "used for a commercial activity in the United States." *See* 28 U.S.C. § 1610(a)

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a judgment. In fact, Plaintiff's position conflicts with the language of the statute itself, as explained in this memorandum.

[12] As evidence of waiver, Plaintiff points to Rule 28(6) of the International Chamber of Commerce, which required ROC to 'undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." *See* Plaintiff's Opposition to Garnishee's Motion to Vacate TRO, to Dissolve Writs of Attachment and Garnishment, and to Dismiss, Docket Entry No. 51, p. 29. Also, Plaintiff contends that failure to appear constitutes a waiver of immunity.

[13] The parties appear to agree that the judgment is based on an order confirming an arbitral award.

In a recent opinion, the Fifth Circuit set forth the standard for making this determination. *Conn. Bank of Commerce*, 309 F.3d at 254. As the Fifth Circuit explained, "[t]o use property for a commercial activity, within the ordinary meaning of "use," would be to put the property in the service of the commercial activity, to carry out the activity by means of the property." *Id.* Property that is revenue or income of commercial activity does not meet this test. *Id.* In other words, the court looks not to the source, but to the use of the property in determining whether it is subject to execution under 28 U.S.C. § 1610(a). *See id.* at 253.

For purposes of this Memorandum Opinion, the court assumes that the payment obligations arising out of the PSAs were due and owing at the time that the Writ of Garnishment was served on Garnishee. Those obligations are intangible property indisputably acquired through commercial activity. However, that is not enough to overcome immunity from execution. In order to fit within 28 U.S.C. § 1610(a), Plaintiff must demonstrate that those obligations were used for commercial activity. *See id.* at 254. The only theory that Plaintiff advances to satisfy this requirement is that Garnishee and ROC entered negotiations, after learning of Plaintiff's attempts to garnish the property, to adjust the bonus amount as a method of reimbursement for litigation costs. Without citing to any evidence, Plaintiff stated in its response:

> In particular, [Garnishee] proposed that its bonus payments would be used to reimburse [Garnishee] for the commercial costs of obtaining counsel to defend it in this very proceeding and to indemnify [Garnishee] from the commercial effects of payment to [Plaintiff] if it prevailed in

> this case. [ROC], in turn, agreed to negotiate over the use of these royalty payments for these commercial activities within the United States.[14]

Plaintiff claims that such efforts would amount to the "use of assets in commercially related negotiations" and, therefore, would fall within the exception to immunity.[15] Although Plaintiff cited no evidence, the court finds that the evidence cited by Garnishee shows that the parties to the PSAs discussed entering into an agreement to protect Garnishee from double payments and that Garnishee proposed that the legal expenses be treated as petroleum costs under the PSAs.[16] However, an agreement never was reached.[17]

In *Conn. Bank of Commerce*, the Fifth Circuit expounded on an earlier decision that "illustrate[d] how certain intangible property can uncontroversially be viewed as used in service of a commercial activity in the United States." *Conn. Bank of Commerce,* 309 F.3d at 258 (explaining *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989)). In *Atwood Turnkey Drilling, Inc.*, a foreign state instrumentality used a letter of credit to secure the services of an American drilling company. *See Conn. Bank of Commerce*, 309 F.3d

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[14] Plaintiff's Opposition to Garnishee's Motion to Vacate TRO, to Dissolve Writs of Attachment and Garnishment, and to Dismiss, Docket Entry No. 51, p. 30.

[15] *Id.*

[16] Garnishee's Reply to Plaintiff' a Opposition to Garnishee's Motion to Vacate TRO, to Dissolve Writs of Attachment and Garnishment, and to Dismiss, Docket Entry No. 60, pp. 14-15; Ex. *C,* Deposition of Bruce R. Laws, p. 114; Ex. D, Deposition of William R. Gage, Jr., p. 81.

[17] *Id.* at Ex. C, Deposition of Bruce Laws, p. 134; p. 210.

at 258. The Fifth Circuit explained that, the foreign state instrumentality "put the letter of credit in service of the commercial activity, it 'spent' the letter of credit on that activity." *Id.* As another example of how intangible property might be used for commercial activity, the Fifth Circuit pointed to the use of tax and royalty obligations as collateral for loans from United States banks. *Id.* at 259.

Plaintiff claims that ROC used the PSA payment obligations in negotiations with Garnishee over reimbursement of the costs of this suit. As intangible property, the PSA payment obligations would meet the commercial activity use requirement if ROC "spent" the obligations on the type of action in the United States "by which a private party engages in trade and traffic or commerce." *See Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (internal quotations omitted); *Conn. Bank of Commerce*, 309 F.3d at 258. Failures of evidence and law prevent such a finding in this case.

Plaintiff cites the court to no evidence that ROC used, or even attempted to use, the payment obligations to purchase any services from Garnishee. That is, ROC did not try to purchase any service from Garnishee, such as representation in this action, or to buy anything of value from Garnishee. Rather, Garnishee approached ROC in an effort to avoid double payment and to seek a guarantee that any monies expended on litigation could be offset against the amount Garnishee owed ROC. The evidence fails to support the conclusion that ROC spent or attempted to spend the payment obligations in any manner, commercial or otherwise. Furthermore, there is no evidence that ROC engaged in the alleged negotiations within the United States. *See* 28 U.S.C. § 1610(a) (requiring that

the property be used for a commercial activity in the United States).

In addition to a lack of evidence, Plaintiff cites no legal authority that holds that negotiations implicate the "use" of property within the meaning of 28 U.S.C. § 1610(a). The Fifth Circuit considers negotiation to be commercial activity within the context of the exceptions for jurisdictional immunity found in 28 U.S.C. § 1605(a)(2). *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 387 n.9 (5th Cir. 1991). Even so, the court is unwilling, without clear legal authority, to read into the narrower 28 U.S.C. § 1610(a) any suggestion that all property discussed during negotiations is "used" for a commercial activity and is, therefore, subject to attachment and execution.[18] Such is an unwarranted expansion of the statute.

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[18] Another district court similarly held in an unpublished Opinion:

> Even assuming that negotiation of the Itochu debt did constitute a "commercial activity," the Congo did not carry out the negotiations thy means of" the Garnishees' royalty obligations. It just discussed the royalty obligations as a potential way to settle the debt during the negotiations. In comparison, if instead the parties had reached a settlement agreement to use the royalty obligations to repay the debt, the debt would be repaid "by means of" the Garnishees' royalty obligations to the Congo.

Af-Cap, Inc. v. The Republic of Congo, No. 01-0100, slip op. at 16-17 (W.D. Tex. Apr. 7, 2003)

28 U.S.C. § 1610(b)

Finding that ROC is entitled to immunity under 28 U.S.C. §1610(a), the court turns to Plaintiff a s second theory for avoiding the FSIA's grant of immunity. Plaintiff contends that its judgment against ROC and CCA can be enforced against SNPC's property because SNPC is the alter ego of ROC and, as such, is liable for ROC's debts. The obligations under PSAs, according to Plaintiff, require that Garnishee pay money to both ROC and SNPC. Because SNPC is an agency or instrumentality of ROC engaged in commercial activity in the United States, Plaintiff explains, it is subject to the waiver exception of 28 U.S.C. § 1610(b)(1). This entire theory rests, in the first place, on Plaintiff's ability to show that SNPC is liable for the debts of ROC.

An instrumentality of a foreign state is presumed to retain its own separate juridical status. *Walter Fuller Aircraft Sales, Inc. v. Republic of Phil.*, 965 F.2d 1375, 1381 (5th Cir. 1992); *see also First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 626-27 (1983) ("Bancec"). The party wishing to overcome that presumption bears the burden of proof. *Walter Fuller Aircraft Sales, Inc.*, 965 F.2d at 1381. In *Bancec*, the United States Supreme Court discussed when an instrumentality's separate status is to be disregarded. *Bancec*, 462 U.S. at 628-33. Relying on equitable principles in that case, the Court offered no formula for determining whether an instrumentality is an alter ego of its foreign state. *Id* at 633. Based on the *Bancec* decision and other precedent, the Fifth Circuit discussed with greater specificity what factors a court might consider in the analysis. *Walter Fuller Aircraft Sales Inc.*, 965 F.2d at 1382-83. "[W]e look to the ownership and management structure of

the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government." *Id.* at 1382.

Although Plaintiff cited generally to the *Bancec* case, Plaintiff failed to outline the factors this court should consider or to develop the evidentiary record in support of those factors. The record certainly does not contain enough information for the court to decide that SNPC was an alter ego of ROC.[19] Plaintiff failed to overcome the presumption of separate juridical status.

The court finds that Plaintiff failed to demonstrate that an exception to immunity from attachment and execution applies. The PSA payment obligations are immune under the FSIA.

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[19] As evidence, Plaintiff would have the court rely solely on the testimony of Garnishee's corporate representative in which he stated that Garnishee assumed that the two representatives with whom Garnishee negotiated during one particular meeting in Paris spoke for both ROC and SNPC. Plaintiff's Opposition to Garnishee's Motion to Vacate TRO, to Dissolve Writs of Attachment and Garnishment, and to Dismiss, Docket Entry No. 51, Ex. 52, Deposition of Bruce Laws, pp. 193-94. Other than this statement, Plaintiff cites the court to two foreign decisions in which those courts determined that SNPC was a legal fiction. *See* Opposition to Garnishee's Notion to Vacate TRO, to Dissolve Writs of Attachment and Garnishment, and to Dismiss, Docket Entry No. 51, p. 32 and n.5. Plaintiff provides no relevant legal authority to indicate that these decisions are binding on this court or, for that matter, that the facts and analysis in those decisions should be relied on by this court.

III. Conclusion

In accordance with the foregoing, the court **GRANTS** Garnishee's Motion to Vacate Temporary Restraining Order, to Dissolve Writs of Attachment ad Garnishment, and to Dismiss and **DENIES** Plaintiff's Motion for a Turnover Order. All other motions are **MOOT**.

The Writs of Attachment and the Writ of Garnishment are **DISSOLVED**, and the TRO is **VACATED**.

Garnishee requested costs, expenses, and attorney's fees in this proceeding pursuant to Tex. R. Civ. P. 677. Plaintiff did not respond to Garnishee's request. Because the property is immune from execution under the FSIA, the application of Tex. R. Civ. P. 677 is unclear. Therefore, the court **ORDERS** the parties to brief the issue of whether Garnishee is entitled to costs and attorney's fees for prevailing in this the date of this order. The briefs are due ten days from the date of this order.

SIGNED in Houston, Texas, this 25th day of February, 2004.

/s/ Nancy Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

STATUTES

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting

within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources

(as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as

provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during

which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on Discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the

United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign

state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its

employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant

to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. – The President may waive any provision of paragraph (1) in the interest of national security.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Supreme Court, U.S.
FILED
MAR 11 2005
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No. 04-1071

IN THE

Supreme Court of the United States

WALKER INTERNATIONAL HOLDINGS LIMITED,

Petitioner,

v.

THE REPUBLIC OF CONGO, CAISSE CONGOLAISE D'AMORTISSEMENT, and MURPHY EXPLORATION & PRODUCTION COMPANY - INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MURPHY EXPLORATION & PRODUCTION COMPANY - INTERNATIONAL

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding that, under Section 1610(a) of the Foreign Sovereign Immunities Act ("FSIA"), an American court has no jurisdiction to order attachment of a foreign sovereign's property unless it is "used for a commercial purpose in the United States," conflicts with the decisions of other courts of appeals interpreting Section 1605, a statute that deals with *in personam* actions directly against foreign sovereigns, rather than *in rem* actions against their property.

2. Whether the Fifth Circuit's interpretation of Section 1610(a) renders superfluous Section 1611, which affords absolute immunity to certain types of property belonging to a foreign sovereign no matter where or how they are used.

RULE 29.6 STATEMENT

Murphy Exploration & Production Company-International is a wholly owned subsidiary of Murphy Exploration & Production Company, which is a wholly owned subsidiary of Murphy Oil Corporation, a publicly traded company.

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Murphy Exploration and Production Company – International ("Respondent") files this Opposition to the Petition of Walker International Holdings Limited ("Petitioner") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 395 F.3d 229 (5th Cir. 2004) and is reprinted in the Appendix to the Petition ("App.") at 1a-15a. The district court's opinion, which is not reported, is reprinted at App. 16a-29a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Section 1610(a) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, which specifies when an American court may issue an order of attachment or garnishment to enforce a judgment against the property of a foreign sovereign. The provisions of the FSIA are reproduced at App. 30a-48a.

STATEMENT OF THE CASE

Introduction

In seeking this Court's review, Petitioner argues that the Fifth Circuit erred in granting Respondent "standing" to challenge the district court's jurisdiction under FSIA Section 1610.[1] Petitioners are both confused and wrong.

Properly understood, Petitioner's argument is that Respondent did not have the right to raise the FSIA as a jurisdictional bar to Petitioner's attempt to garnish property held by Respondent, and allegedly belonging to the Republic of Congo ("ROC"). The Fifth Circuit properly rejected Petitioner's mislabeled "standing" argument as "irrelevant." (App. 4a.) As the court recognized, Section 1610(a) deprives American courts of jurisdiction over the property of a foreign sovereign – even if that sovereign waives its immunity – unless the court determines, as an initial matter, that the property is "in the United States" and "used for a commercial activity in the United States." Because Section 1610(a) limits the courts' authority to issue an order of attachment, any party was entitled to raise it; indeed, the Court could have considered it *sua sponte*. As the defendant in this action, Respondent unquestionably had the right to protect itself by invoking the jurisdictional provision of the FSIA to defeat Petitioner's garnishment claim.

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[1] All statutory references in this brief are to the FSIA unless otherwise specified.

Petitioner fails to show that the Fifth Circuit's interpretation of Section 1610(a) is at odds with the opinion of any other court. Indeed, the only courts to consider the provisions in question have ruled consistently with the Fifth Circuit.

Factual and Procedural Background

After purchasing an assignment of an Italian company's contractual rights against the ROC, Petitioner filed an arbitral complaint on the contract in France, ultimately winning an award of over $26 million against the ROC.[2] (App. 2a.) Petitioner then obtained a default judgment on the award against the ROC in the United States District Court for the District of Columbia, and looked for a way to execute on the judgment. Petitioner learned from the press that the ROC had signed a production sharing agreement with Respondent, and suspected that Respondent owed the ROC signing bonuses and other payments. (App. 2-3.) Seeking to attach these funds, Petitioner filed a garnishment action against Respondent in the United States District Court for the Southern District of Texas. (*Id.*)

The Texas district court denied Petitioner's request for an order of garnishment, concluding that Section 1610(a) limited the court's jurisdiction over the alleged debt because it did not consist of funds "used for commercial activity" by the ROC, as the statute requires. (App. 19a-28a.)[3] Petitioner appealed, and the Fifth Circuit affirmed.

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[2] The award and judgment were against both the ROC and its subsidiary, Caisse Congolaise D'Amortissement ("CAS"). Because the role of the CAS is not at issue, we refer simply to the ROC.

[3] Section 1610 provides, as relevant here:

(a) *The property in the United States* of a foreign state

(Cont'd)

The Fifth Circuit agreed with the district court that it could not permit Petitioner to execute on property allegedly owned by the ROC unless Petitioner could meet all of the statutory requirements of Section 1610(a). To do so, Petitioner had to show not only that the ROC had waived its sovereign immunity, but also, as an initial matter, that the property Petitioner sought to garnish was "in the United States" and was being "used [by the ROC] for a commercial activity in the United States." (Pet. App. 6a.) Because Petitioner could not meet the commercial activity requirement, the Fifth Circuit held the property was immune from attachment. (Pet. App. 10a-13a, 15a.)

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Opinion Does Not Conflict With The Law Of Other Circuits Or With This Court's Jurisprudence.

A. Petitioner's Argument.

In an effort to manufacture a circuit split, Petitioner frames the issue as one of "standing" under the FSIA.

(Cont'd)

> . . . *used for a commercial activity in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication. . . .

(Emphasis added)

Petitioner then proceeds to cite cases that concern the standing of a party to raise a foreign sovereign's *in personam* immunity from jurisdiction under Section 1605(a) of the FSIA. These cases are irrelevant, because this case deals with *in rem* jurisdiction under Section 1610(a), not *in personam* jurisdiction under Section 1605(a). Petitioner's argument fails because it ignores the distinction between these separate provisions of the FSIA.

Petitioner then compounds its error by treating the issue of waiver as dispositive under Section 1610(a). But, as that statute expressly states, and as all courts to consider the issue have held, an American court may not entertain an action for attachment or garnishment to enforce a judgment unless it determines that the property in question is both "in the United States" and "used for a commercial activity in the United States." Petitioner's action was dismissed because it failed the second prong of this test.

Petitioner's attempt to seek review of that ruling by pointing to cases interpreting Section 1605 is meritless because Section 1605 does not contain the same requirements as Section 1610.

B. Statutory Background.

The FSIA is a comprehensive regulatory statute that applies in every action against a foreign state and codifies the modern doctrine of "restrictive" foreign sovereign immunity recognized under international law. *E.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). Prior to the FSIA, foreign sovereigns urged the executive branch to afford them absolute immunity, and the executive branch generally complied. *Id.* The FSIA was designed to

depoliticize decisions regarding foreign sovereign immunity by transferring them from the executive to the judicial branch of government. *Republic of Austria v. Altman*, 124 S. Ct. 2240, 2253 (2004); *Dames & Moore v. Regan*, 453 U.S. 654, 658 (1981). The FSIA is thus in essence a jurisdictional tool that creates exceptions to sovereign immunity, as set forth in Sections 1604 to 1605, and to a lesser extent, to attachment to enforce a judgment, as set forth in Sections 1609 to 1611.

Section 1610 raises more hurdles than Section 1605 to the court's assumption of jurisdiction, reflecting the historical distinction between execution of a judgment against a foreign sovereign's property and actions against a foreign sovereign on the merits. Enforcing a judgment attachment has always been regarded "as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. ROC*, 309 F.3d 240, 255-56 (5th Cir. 2002) (cited by the Fifth Circuit at App. 20a, n.10); *see Verlinden*, 461 U.S. at 486 (historically, even under the "restrictive" theory of sovereign immunity, foreign sovereigns have enjoyed complete immunity from execution of a judgment against their property in American courts). The FSIA retains this distinction. *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984) (relying on international law background of FSIA to conclude that the FSIA's exceptions to *in rem* immunity under Section 1610(a) were indeed narrower than its exceptions to *in personam* immunity); *Ministry of Def. & Support for The Armed Forces v. Cubic Def. Sys.*, 385 F.3d 1206, 1218-19 (9th Cir. 2004) ("The FSIA narrowed the scope of immunity from attachment, but . . . the structure of the Act makes clear that it preserved the traditional distinction between the two forms of immunity.") (footnote omitted). The additional requirements of Section 1610(a) reflect the concern that

enforcing a judgment against a foreign sovereign is a greater affront to it than subjecting it to a lawsuit on the merits.

A foreign sovereign's waiver of immunity is relevant to both *in personam* and *in rem* jurisdiction under the FSIA. 28 U.S.C. §§ 1605(a)(1), 1610(a)(1) and (b)(1). In keeping with the historical difference between them, however, the FSIA treats waiver differently. Under Section 1605, a foreign sovereign's waiver of immunity *standing alone* permits American courts to exercise jurisdiction over the foreign sovereign. 28 U.S.C. § 1605(a)(1). Under Section 1610(a), by contrast, the waiver alone is not enough. Rather, a court must determine, as an initial matter, that the property on which a plaintiff seeks to execute is both "in the United States" and "used for a commercial activity in the United States" before it can exercise jurisdiction based on waiver (or one of the other enumerated exceptions listed in Section 1610). 28 U.S.C. § 1610(a)(1).

Here, the Fifth Circuit properly considered whether the property at issue met all three of Section 1610(a)'s jurisdictional prerequisites. The court held that the sovereign had waived immunity to execution, and that the property was in the United States. It then properly concluded that the requirements of Section 1610(a) had not been met because there was no evidence the property was "used [by the ROC] for a commercial activity in the United States." (App. 10a-13a.)

C. The Fifth Circuit's Construction Of Section 1610(a) Accords With The Plain Language Of The Statute And With The Second Circuit's Interpretation Of The Statute.

Petitioner's argument rests entirely on the proposition that, because the ROC waived its immunity, the Fifth Circuit erred in holding that a federal district court lacked subject matter jurisdiction over the ROC's property. This argument ignores the express language of Section 1610(a), which makes plain that waiver is not the *sine qua non* of jurisdiction over the property of a foreign sovereign.

As set forth above, the property of a foreign sovereign is immune from attachment under Sections 1609 and 1610, and federal courts thus lack jurisdiction over that property, unless it (1) is "in the United States"; (2) is "used for a commercial purpose in the United States," *and also* meets one of the other exceptions for immunity (*e.g.*, waiver) listed in Section 1610(a). 28 U.S.C. § 1610(a). The Fifth Circuit's holding that the district court lacked subject matter jurisdiction over the property in question because there was no showing that it was used for commercial purposes in the United States reflects nothing more than a straightforward application of Section 1610(a). (App. 10a-13a.) *Conn. Bank*, 309 F.3d at 250; *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 365 (5th Cir. 2004) (waiver of immunity applies only to property that meets the statutory prerequisites set forth in Section 1610(a), namely that the property be "in the United States" and "used for commercial activity in the United States"), *pet. for cert. filed on other grounds*, 73 USLW 3466 (Jan. 31, 2005) (No. 04-1043).

The Second Circuit is the only other circuit to address the relationship of the prerequisites listed in Section 1610(a) with its subsequent enumerated exceptions, *e.g.*, waiver. Its construction of the provision is entirely consistent with that of the Fifth Circuit. In *De Letelier*, 748 F.2d 790 (2d Cir. 1984), the Second Circuit held that plaintiff could not execute against the property of a foreign state because the property was not used for a commercial activity, even though one of the enumerated exceptions to immunity from execution – political terrorism – was indisputably present. *Id.* at 798-99. The court explained that, in enacting the FSIA, Congress did not intend to reverse completely the historical and international antipathy to executing against a foreign state's property, even if the end result is "a right without a remedy." *Id.* In the same vein, in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), the Second Circuit reiterated that Section 1610(a) requires a plaintiff to show that the property to be garnished is in the United States and is used for a commercial activity in the United States, in addition to showing that one of the exceptions listed in Section 1610 (such as waiver or terrorism) is present. *Id.* at 82-83.

In short, even if the ROC explicitly waived its immunity, execution on the ROC's property remained subject to the other requirements of Section 1610(a), which, unlike the provisions of Section 1605, require a showing that the property is in the United States and used by the sovereign for a commercial activity in the United States, *in addition to* waiver.

Petitioner contends that the interpretation of Section 1610(a) adopted by the Fifth Circuit (and, by implication, the Second Circuit) conflicts with the "purposes of the FSIA,"

which Petitioner maintains (without citation to any authority) was designed to placate foreign nations' "foreign policy objectives." (Pet. 10.) Petitioner is mistaken. As discussed above, prior to enactment of the FSIA, foreign countries invariably placed diplomatic pressure on the executive branch to assert immunity on their behalf in all types of cases brought against them in American courts, and the executive branch typically acceded to their requests. *Verlinden*, 461 U.S. at 487-88. The FSIA sought to supplant this practice by "clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims." *Altman*, 124 S. Ct. at 2253. In doing so, the FSIA adopted a "restrictive theory of sovereign immunity," *Verlinden*, 461 U.S. at 488, which permitted the courts to assert jurisdiction in certain specified circumstances. If anything, then, the FSIA tends to frustrate, rather than accommodate, the "foreign policy objectives" of foreign countries, because they can no longer lobby the executive branch to free them for litigation in American Courts. The Fifth Circuit carried out the purpose of the FSIA by applying the provisions of Section 1610(a).

D. The Circuit Court Decisions Petitioner Cites To Support Its Claim Of Circuit Conflict Are Irrelevant Because They Address Section 1605, Not Section 1610(a).

According to Petitioner, the Fifth Circuit's holding that Section 1610(a) applies whether or not the foreign sovereign raises it as a defense conflicts with decisions of the Second, Ninth, and Eleventh Circuit Courts of Appeals. (Pet. 6-9.) Petitioner is wrong.

As the Fifth Circuit explained in *Connecticut Bank*, 309 F.3d at 250, Section 1610(a) is a jurisdictional statute limiting the power of the court over a foreign sovereign's property. It is elementary that any party can raise a jurisdictional argument and that the court also may consider jurisdiction *sua sponte*. *E.g.*, *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999).

All of the cases Petitioner cites – *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *Wilmington Trust v. United States Dist. Ct.*, 934 F.2d 1026 (9th Cir. 1991), and *Aquamar*, 179 F.3d 1279 – concern the immunity of a foreign sovereign (or its agent), an issue governed by Sections 1604 and 1605, rather than the immunity of a foreign sovereign's property from attachment and execution, which is governed by Sections 1609 to 1611. *See Marcos*, 806 F.2d at 360-61 (holding appellants could not raise immunity of former head of state on his behalf); *Wilmington Trust*, 934 F.2d at 1032-33 (holding appellants could not avoid a jury trial by cloaking themselves in the immunity of an absent sovereign state); *Aquamar*, 179 F.3d at 1290-91 (citing *Wilmington* in dicta, and applying Section 1605 to the agent of a foreign sovereign).

The Eleventh Circuit's decision in *Aquamar* supports, rather than contradicts, the Fifth Circuit's decision. There, the court observed that a court may address the issue of foreign sovereign immunity *sua sponte* in the context of Section 1605(a) when its "jurisdiction rests on the presence of the foreign sovereign." 179 F.3d at 1290 (citing, *inter alia*, *Verlinden*, 461 U.S. at 493 n.20 (1982)) ("subject matter jurisdiction in any [] action [against a foreign sovereign] depends on the existence of one of the specified exceptions to foreign sovereign immunity"). Just as a court should

determine whether it has subject matter jurisdiction over a foreign sovereign under Section 1605, even if the parties do not raise the issue, it should do so when asked to exercise its authority over a foreign sovereign's property under Section 1610. That is what the court did here.[4]

In sum, Petitioner's alleged circuit split is non-existent.[5]

E. There Is No Conflict With This Court's Prudential Standing Jurisprudence.

Petitioner next asserts that the Fifth Circuit's decision is in conflict with this Court's prudential standing

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[4] Having cited *Aquamar* to support its standing argument, Petitioner then seeks to distinguish it on the ground that here, unlike *Aquamar*, subject matter jurisdiction was not dependent on foreign sovereign immunity (Pet. 9), but that is simply wrong. Petitioner's claim to the property in question was based on its allegation that the property belonged to the ROC – Petitioner had no independent right to property belonging to Respondent.

[5] To the extent Petitioner is arguing that a garnishee is not personally injured by a claim made on property in its possession, its objection is meritless. Respondent was certainly exposed to the risk that the property would be garnished, leaving it liable to the ROC for failing to adequately protect it. Under Texas law, the garnishee has a legal duty to raise any known defenses. *E.g.*, *Southwest Bank & Trust Co. v. Calmark Asset Mgmt., Inc.*, 694 S.W.2d 199, 200-01 (Tex. App.—Dallas 1985, *writ ref'd n.r.e.*) (holding that "the garnishee has a duty to disclose any defense to the garnishment writ of which he is aware"); *Rowley v. Lake Area Nat'l Bank*, 976 S.W.2d 715, 720 (Tex. App.—Houston [1st Dist.] 1998, *pet. denied*) (garnishee "had a duty to disclose any defense to the garnishment writ of which it was aware").

jurisprudence.[6] (Pet. 14-17.) Again, Petitioner is mistaken. The cases Petitioner cites concern the standing of individuals or associations to bring suit on behalf of others and have nothing to do with this case or with the FSIA. *See United Food & Comm. Workers v. Brown Group, Inc.*, 517 U.S. 544 (1996) (holding that union had standing to bring action on behalf of its members because Congress had abrogated jurisprudential standing limitations in cases like the one at bar); *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (holding noncustodial parent lacked standing to litigate on child's behalf).

Representational standing is not at issue here because Murphy did not bring suit on behalf of itself or anyone else. Rather, it was haled into court by Petitioner, who sued to garnish its property on the ground Respondent owed money to the ROC.

Further, as discussed above, standing is irrelevant because Section 1610(a) defines the jurisdictional limits of a district court's authority over the property of a foreign sovereign, and must be considered by the court even if a party does not raise it.

II. The Fifth Circuit's Interpretation of Section 1610 Does Not Render Section 1611 "Superfluous."

Petitioner argues (without citation to authority) that, by interpreting Section 1610(a) to require a showing of use for

[6] The Court's prudential standing jurisprudence encompasses, *inter alia*, "the general prohibition on a litigant's raising another person's legal rights." *E.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2304 (2004); *Allen v. Wright*, 468 U.S. 737, 750 (1984).

a commercial activity in the United States in addition to waiver, the Fifth Circuit renders Section 1611 "superfluous." (Pet. 22.)

Section 1611 provides that certain types of property owned by a foreign state – *e.g.*, military and embassy property – are immune from execution "[n]otwithstanding the provisions of section 1610 of this chapter." 28 U.S.C. § 1611. Petitioner argues that Section 1611 would not be necessary to protect military and embassy properties if a commercial activity requirement were read into Section 1610(a) because such properties are not commercial and would thus invariably be immune from attachment. (Pet. 22-23.) This argument ignores the possibility that embassies and military property could be used for a commercial purpose, such as collateral for a loan, and could thus qualify for an exception from immunity under Section 1610(a).

Section 1611 was included in the FSIA to ensure that embassies and military property, which are core to the functions of a sovereign state, are immune from attachment under any circumstances, regardless of waiver or commercial activity. 28 U.S.C. § 1611. The commercial activity requirement of Section 1610(a) thus does not render Section 1611 superfluous.

III. Petitioner Has Waived Issues That Are Not Listed Or Included Within Its Questions Presented. In Any Event, These Issues Do Not Warrant Review By This Court.

Petitioner raises a number of arguments that are not fairly included within its "questions presented." This Court ordinarily does not consider claims raised in such

circumstances. Sup. Ct. R. 14.1(a), 24.1(a); *Jones v. United States*, 527 U.S. 373, 394 n.11 (1999) (declining to address claim outside questions presented in petition); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993) (same). The issues discussed below are not included within the "questions presented," which concern (1) Murphy's "standing" to raise FSIA defenses and (2) the effect of a foreign state's waiver of immunity. They are thus waived. We nevertheless address them briefly in an abundance of caution.

A. The Fifth Circuit's Decision Does Not Conflict With The United States' Treaty Obligations Or With The Federal Arbitration Act.

Petitioner argues that the Fifth Circuit's interpretation of the FSIA creates a conflict with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention") and the Federal Arbitration Act ("FAA"). (Pet. 17, 20, 23-25.) Petitioner is wrong.

The New York Convention does not apply here because it "does not apply to the enforcement of judgments that confirm foreign arbitration awards." *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 n.2 (2d Cir. 1987); *see Cubic*, 385 F.3d at 1215 (the New York Convention is no longer relevant once an arbitral award is transformed into a judgment; the Convention has no bearing on attachment or execution of a judgment).

Petitioner does not explain how the FAA conflicts with the Fifth Circuit's interpretation of Section 1610(a), except to cite *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001),

which speaks in general terms about the policy in favor of enforcing arbitration agreements, but says nothing about execution of arbitral awards in general, let alone awards against a foreign sovereign's property. (Pet. 23.)

This issue does not warrant review because there is no conflict with the New York Convention or the FAA.

B. The Fifth Circuit Followed Well-Established Precedent In Interpreting The Commercial Activity Exception To The FSIA.

Petitioner also argues that the Fifth Circuit erred in applying the commercial activity exception to immunity by considering how the property would be used, rather than by considering its "nature." (Pet. 21-22, citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992)). But there is nothing unusual about the Fifth Circuit's focus on the "use" to which property is put – indeed Section 1610(a) requires courts to consider whether property is "*used* for a commercial activity." 28 U.S.C. § 1610(a) (emphasis added). It is also perfectly in keeping with this Court's opinion in *Weltover*, which holds, in the context of Section 1605(a)(2), that courts should consider the "nature" or "type" of actions that a sovereign engages in, as opposed to the sovereign's "motive or purpose," in determining whether they fall within the commercial activity exception to immunity. 504 U.S. at 614.

In any event, the issue is irrelevant, because the Fifth Circuit's determination was based on its conclusion that Petitioner failed to produce any evidence showing how the ROC used the property: "Beyond assertions of litigation and administrative reimbursements, there is *no evidence* in the record showing how the signing bonus and other payments

were actually used, or even how other bonuses were used in the past." (App. 12a, emphasis added.)

This Court does not sit to correct allegedly erroneous interpretations of the record. Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Accordingly, this issue, even if it had been raised in the questions presented, does not warrant review.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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WALKER INTERNATIONAL HOLDINGS LIMITED,

Petitioner,

v.

THE REPUBLIC OF CONGO, CAISSE CONGOLAISE D'AMORTISSEMENT, and MURPHY EXPLORATION & PRODUCTION COMPANY – INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION

The opposition to the petition for writ of certiorari in this case is as telling for what it does not address as for what it does. Murphy does not dispute that the Fifth Circuit's interpretation of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA") has broad and significant implications, both economic and jurisprudential. Nor does Murphy dispute that the Fifth Circuit's interpretation is at odds with the plain meaning of the FSIA. Similarly, Murphy ignores most of the absurd results flowing from the Fifth Circuit's ruling. It does not dispute that under the Fifth Circuit's interpretation, a foreign state's central bank accounts would be entitled to less protection under the FSIA than ordinary commercial property. Murphy also does not dispute that the Fifth Circuit's interpretation fails to reconcile the New York Convention and the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208 ("FAA") with the FSIA. Murphy asserts that as a stakeholder, garnishee, it has a "duty" to stand in the shoes of the Congo and raise all "known defenses" of the Congo, but ignores that the Congo waived any defense of sovereign immunity.

Instead of addressing the questions presented in the petition, Murphy recasts them to ones it can answer.[1] Although the Petition asks whether a garnishee has representational standing to raise defenses that were waived by the judgment debtor where the court's subject matter jurisdiction is not disputed, Murphy asks whether it is proper for a court that lacks subject matter jurisdiction

[1] A respondent is only permitted to rephrase the questions presented if it first demonstrates that there is a misstatement of fact or law that gives rise to an incorrect issue. *See* Sup. Ct. R. 15.2. Murphy has not pointed to any such misstatement that would justify its gratuitous rewriting. *See Eldred v. Ashcroft*, 537 U.S. 186, 232 n.8 (2003) (Stevens, J., dissenting) (noting that "[r]espondent's reformulation of the questions presented by this case confuses [important distinctions].").

to attach property. Murphy suggests that this is not a case of representational standing because it was challenging the court's subject matter jurisdiction – a challenge that can be posed by anyone at anytime. But, no one, including Murphy, ever asserted that the court lacked subject matter jurisdiction under 28 U.S.C. § 1330. Murphy's reformulated question conflates subject matter, *in personam* and *in rem* jurisdiction, and sovereign immunity. They are not the same. Congress made this clear in the FSIA. It is only by blurring the distinctions that Murphy hopes to erase the vibrant circuit split demonstrated in Walker's Petition. Similarly, where the Petition asks whether a foreign state can waive its immunity from attachment, subject only to section 1611, Murphy focuses on only one aspect of the waiver issue, rewriting the question to mask its significance and again avoid the circuit split.

I. THE CIRCUITS ARE SPLIT WITH RESPECT TO REPRESENTATIONAL STANDING

Murphy's opposition hinges on whether section 1610(a) is the source of the court's subject matter jurisdiction to execute on a judgment against a foreign state. If section 1610 is jurisdictional, then it might be raised by anyone at anytime. If section 1610(a) is not the exclusive source of subject matter jurisdiction, then it can be waived and once waived, it is subject to the normal rules of standing. In the latter scenario, the Fifth Circuit's decision creates a clear circuit split.

Section 1610(a) is not jurisdictional. First, the source of any court's subject matter jurisdiction under the FSIA derives from 28 U.S.C. § 1330, which was enacted as part of the FSIA and specifically refers to sections 1605-1607 of the FSIA for subject matter jurisdiction and section 1608 for personal jurisdiction. *See* Pub. L. No. 94-538, 90 Stat. 2891 (Oct. 21, 1976). Congress could not have been clearer in vesting the exclusive source of subject matter jurisdiction in 28 U.S.C. § 1330. Thus section 1604 is aptly entitled "immunity of a foreign state from jurisdiction" and

section 1605 is entitled "general exceptions to the jurisdictional immunity of a foreign state." In contrast, neither section 1609 nor 1610 mentions subject matter jurisdiction or references the term "jurisdiction." Throughout these proceedings, no party has questioned the court's subject matter or personal jurisdiction under 28 U.S.C. § 1330.

Second, Murphy's argument rests on a misunderstanding of the distinctions between subject matter, *in personam*, and *in rem* jurisdiction and sovereign immunity. Murphy suggests that under section 1610, a court can consider whether it has *in rem* jurisdiction *sua sponte*. This argument makes no sense. Garnishment is not an *in rem* proceeding; "it is well-settled that garnishment is an ancillary proceeding 'growing out of, and dependent upon, another original or primary action or proceeding.'" *Smith v. Lorillard, Inc.*, 945 F.2d 745, 746 (4th Cir. 1991), *quoting* 38 C.J.S. Garnishment § 2(a)(4) (1943). Nor was personal jurisdiction at issue since in proceedings both in New York and Texas, the Congo defaulted after having been properly served. The lower courts correctly concluded that they had proper subject matter and *in personam* jurisdiction. The Fifth Circuit did not conclude otherwise. Even if garnishment were *in rem* or *quasi in rem*, the Fifth Circuit expressly recognized that the situs of the property, *i.e.*, Murphy's debt to the Congo, was in Texas and therefore, the court had jurisdiction over the *res*; Murphy does not dispute this decision. Opp. at 7.

In any event, a property owner can waive *in rem* jurisdiction. *See* Fed. R. Civ. P. 12(h); *Porsche Cars North Am. v. Porsche.net*, 302 F.3d 248, 255 (4th Cir. 2002) (noting that *in rem* jurisdiction can be waived); *Harrods Limited v. Sixty Internet Domain Names*, 302 F.3d 214, 225 n.7 (4th Cir. 2002) (holding that defendants "waived this objection to the district court's *in rem* jurisdiction by failing to raise it"); *United States v. Republic Marine, Inc.*, 829 F.2d 1399, 1401-05 (7th Cir. 1987) (summarizing cases finding *in rem* jurisdiction subject to waiver). Here, the owner of the debt, the Congo, waived any challenge to the

garnishment proceeding. Moreover, as to the Congo, the garnishment proceeding is *in personam*, and the Congo failed to appear. Murphy's assertion that this case turns on *in rem* jurisdictional considerations is inconsistent with the text of the FSIA, its legislative history[2] and the very nature of the garnishment proceeding.

Having failed to demonstrate that section 1610 is jurisdictional, Murphy cannot invoke the FSIA by standing in the shoes of the Congo or in its own right.[3] Murphy declares that representational standing is not implicated here because it "did not bring suit on behalf of itself or anyone else. Rather, it was haled [sic] into court by Petitioner. . . ." Opp. at 13.[4] This Court's standing jurisprudence however draws no distinction between a party's status as a plaintiff or defendant. *See Kowalski v. Tesmer*, No. 03-407 (U.S. 2004) (Thomas, J., concurring); *Campbell v. Louisiana*, 523 U.S. 392 (1998) (assessing whether a criminal defendant had standing to raise certain due process arguments). Standing is "issue dependent"; a party – plaintiff or defendant – may have standing to raise one

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[2] H.R. Rep. 94-1487 at 12-13, 1976 U.S. Code Cong. & Admin. News 6604, 6610-12 (section 1330 provides "a comprehensive jurisdictional scheme in cases involving foreign states. . . . The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 . . . or under any applicable international agreement of the type contemplated by the proposed section 1604."). *See also id.* at 26-27 (stating: "Claimants will clearly benefit . . . from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim in which the foreign state is not entitled to immunity.").

[3] Although Murphy points out that the Fifth Circuit declared Walker's standing argument to be irrelevant, Opp. at 2, the court also found Murphy's claim that it had a duty to raise any known defenses of the Congo irrelevant. Pet. App. at 4a.

[4] Under Murphy's theory, a criminal defendant would never lack standing to raise an issue, because criminal defendants are always in court against their will. This Court has held otherwise. *See Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawling v. Kentucky*, 448 U.S. 98 (1979).

issue, but not another. *See Elk Grove Unified School Dist. v. Newdow*, No. 02-1624 (U.S. June 14, 2004). If a party lacks standing to raise an issue, then by definition, there is no "case or controversy" with respect to that issue and the court lacks Article III jurisdiction to entertain it.

By confusing these jurisdictional concepts, Murphy incorrectly announces that there is no circuit split. To Murphy, the Second, Ninth and Eleventh Circuits' decisions[5] rejecting representational standing under the FSIA are irrelevant because they were addressing section 1605 not section 1610. As the Second Circuit observed, however, "Congress specifically designed the execution immunity rules to 'conform' to the jurisdictional immunity provisions of § 1605." *De Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (citing H.R. Rep. 94-1487).

II. A FOREIGN STATE SHOULD BE ABLE TO WAIVE IMMUNITY FROM EXECUTION EXCEPT AS PROVIDED IN 28 U.S.C. § 1611

The second question presented is whether a foreign state is free to waive its immunity from attachment and execution for its property, subject only to section 1611, *i.e.*, may a foreign state waive the right to invoke section 1609 and thus forego any right under section 1610 to force a judgment creditor seeking to attach property to prove that property is "used for a commercial activity in the United States." Here, the Congo twice waived any defense it might have had to attachment and execution and agreed not to impede enforcement. The Fifth Circuit recognized these waivers and Murphy did not challenge their validity or the Fifth Circuit's findings.

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[5] *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986); *Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999).

Nevertheless, the Fifth Circuit held that the FSIA does not permit a foreign state to waive its section 1609 immunity unless the judgment creditor first proves the property is used for commercial activity in the U.S. under section 1610(a). The Fifth Circuit committed two errors. First, it treated the use of property as akin to subject matter jurisdiction, directly conflicting with the Second Circuit's conclusion "that the applicability and effect of section 1609 are not matters, like subject-matter jurisdiction, that may be raised at anytime by a foreign state," and thus, may be waived. *Caribbean Trading v. Nigerian Nat'l Petroleum*, 948 F.2d 111, 115 (2d Cir. 1991) (finding waiver of defenses sections 1609 and 1610).[6] Second, it confused subject matter jurisdiction and immunity, directly conflicting with the language and structure of the FSIA which distinguish subject matter from *in personam* jurisdiction and immunity from execution. Murphy adds to this confusion by failing to address the plain meaning of the FSIA, and dismissing the relevance of the FAA and the New York Convention.

A. Murphy Fails to Address the Plain Meaning of the FSIA

Other than section 1611, the FSIA does not prevent a foreign state from waiving immunity from attachment

[6] Murphy argues instead that the Fifth Circuit's decision is "entirely consistent" with the Second Circuit's treatment of the relationship between 1610 and its enumerated exceptions, quoting *dictum* from an earlier case, *De Letelier*, 748 F.3d 790, as proof that Congress did not intend to reverse the "antipathy to executing against a foreign state's property, even if the end result is 'a right without a remedy.'" Congress's intent, in enacting the FSIA, is directly at odds with this *dictum*. In the FSIA's legislative history, Congress clearly expressed its intention to avoid a right without a remedy by enacting legislation that "would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment." H.R. Rep. 94-1487 at 8, 1976 U.S. Code Cong. & Admin. News 6606.

under section 1609. This is consistent with this Court's holding that rights, whether constitutional or governmental, can be waived. A party, for commercial or other purposes, "may waive any provision [of the Constitution]." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995), *quoting Shutte v. Thompson*, 15 Wall. 151, 159 (1873). Correspondingly, a government can waive "a sovereign power through contract." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). *See also Frew v. Hawkins*, 540 U.S. 431 (2004) (a state can waive its Eleventh Amendment rights); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). Murphy cites nothing to suggest that Congress intended any different rule to govern the FSIA. Nothing in sections 1609 or 1610 suggests that Congress intended that these provisions be extended greater protection than those in the Constitution. Therefore, sections 1609 and 1610 are subject to the normal rule that permits waiver and Congo waived its immunity here.

By prohibiting a foreign state from waiving attachment immunity with respect to most property, the Fifth Circuit rendered section 1611 superfluous. Section 1611 expressly prohibits a foreign state from waiving attachment immunity with respect to embassy property and military equipment. Murphy argues that the Fifth Circuit's reading is correct because "embassies and military property could be used for a commercial purpose, such as collateral for a loan, and thus could qualify for an exception from immunity under Section 1610(a)." Opp. at 14. Murphy is wrong. Neither military equipment nor embassy property located in the U.S. can be used as collateral for a commercial venture. *See* Foreign Missions Act, 22 U.S.C. §§ 4301 *et seq.* and Arms Export Control Act, 22 U.S.C. §§ 751 *et seq.* (comprehensively regulating ownership interests in and possessory rights to all embassy property and military equipment owned by a foreign government in the U.S.). Section 1611 merely reflects

these limitations on alienation by ensuring that embassy and military property cannot be subject to execution.[7]

B. The Interplay Between the New York Convention, FAA and FSIA Was Not Waived

The Petition challenges the holding that a third party can raise a foreign state's defense of sovereign immunity where the foreign state explicitly waived any immunity. Walker argued that this holding conflicted with treaty obligations and the FAA. Murphy responds by declaring, incorrectly, that these arguments are not fairly included in the questions presented. The question of statutory interpretation certainly is raised in the second question presented concerning whether a court must give effect to a foreign state's broad waiver of immunity. Moreover, whether the FSIA must be read in harmony with the New York Convention and the FAA in fact was raised below, a point that Murphy does not and cannot deny. It is therefore properly before this Court under S. Ct. Rule 14.1(a).

Rule 14.1(a) requires questions presented to be expressed concisely and without unnecessary detail. "The

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[7] Murphy's argument and the Fifth Circuit's ruling also creates the absurd result that under section 1609, a foreign state could not waive immunity for its ordinary commercial properties without proof of commercial use in the U.S., but could waive immunity for the highly sensitive and specially protected central bank accounts held for its own account without such proof. *See* 28 U.S.C. § 1611(b)(1). Congress, however, stated that, in the absence of section 1611(b)(1), "funds used or held in connection with central banking activities" would be treated identically with "funds used solely to finance the commercial transactions of other entities or of foreign states," and that "execution could be levied on such funds without an explicit waiver." Congress sought to avoid this result because if central bank funds were not specially protected beyond the terms of section 1609 or 1610, "deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems." H.R. Rep. 94-1487 at 22.

statement of any question presented is deemed to comprise every subsidiary question fairly included therein," including questions that are "'essential to the analysis' of the question presented, *Procunier v. Naverette*, 434 U.S. 555, 559-560 n.6 (1978), and necessary to 'an intelligent resolution of the constitutionality' of the statute, *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980)." *United States v. IBM Corp.*, 517 U.S. 843, 867-68 (1996) (Kennedy, J., dissenting). *See also Ballard v. Commissioner*, No. 03-184 (March 7, 2005), *citing* R. Stern, *et al.*, SUPREME COURT PRACTICE 414 (8th ed. 2002); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999) (even when parties have waived issues below and in their petition, the Court can consider them when they are "so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented.").

In any event, Murphy addresses the issue, but ignores Walker's arguments. It claims Walker did not explain how the FAA conflicts with the Fifth Circuit's interpretation of 28 U.S.C. § 1610(a) other than citing to *Circuit City Stores, Inc v. Adams.*, 532 U.S. 105 (2001). Murphy apparently stopped reading after that citation and thus overlooked the rest of the argument at Petition at 23-25. Murphy ignores that under the FAA, the court was obligated to enforce Congo's waiver of any defense, including defenses under the FSIA. Murphy ignores the Fifth Circuit's failure to harmonize the FAA and New York Convention with the FSIA.

Murphy instead claims that the Fifth Circuit's decision does not conflict with the New York Convention because the Convention does not apply. Opp. at 15, *citing Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), and *Ministry of Defense & Support for the Armed Forces v. Cubic Defense Sys.*, 385 F.3d 1206 (9th Cir. 2004). Neither *Victrix* nor *Ministry of Defense* endorse the rejection of the Convention here. The assets in *Victrix* were already under the jurisdiction of a foreign state's bankruptcy court. The arbitral award there was obtained

after the parties already had submitted to the bankruptcy court's jurisdiction. The Second Circuit properly deferred to the bankruptcy court under the federal Bankruptcy Act. In *Ministry of Defense*, the plaintiff argued that there was a conflict between the Victims' Protection Act and the Convention. The Second Circuit did not find that the Convention was irrelevant; it found that the Convention had been fully enforced in that case, but was not relevant to whether a third party could attach the judgment at issue. That is not the question here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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